Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHRIS PARADISSIOTIS,

Petitioner,

v.

ROBERT E. RUBIN,
Secretary of the United States Department of Treasury;
R. RICHARD NEWCOMB,
Director of the Office of Foreign Assets Control,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Office of Foreign Assets Control's placement of Petitioner on the list of Specially Designated Nationals, thereby causing the blocking and destruction of Petitioner's personal property and subjecting his ordinary legal affairs to potential criminal sanctions, constitutes a Bill of Attainder in violation of the United States Constitution.

Whether the Libyan Sanction Regulations, 31 C.F.R. § 550.001, *et seq.*, as promulgated or as applied by the Office of Foreign Assets Control unconstitutionally interfere with Petitioner's constitutional right of access-to-counsel.

Whether an Executive agency's construction of a statute or interpretation of its promulgated regulations, which broadly construes or ignores words of limitation, is entitled to any deference under the varying standards of *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984) (interpretation must not be "unreasonable"), section 706(2)(A) of the Administrate Procedure Act (interpretation cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law), or *Consarc Corp. v. United States Treasury, OFAC*, 71 F.3d 909, 915 (1995) (interpretation cannot be "plainly inconsistent"), when the agency's interpretation raises difficult constitutional questions.

Whether the Office of Foreign Assets Control's interpretation of its authority under The International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.*, and Executive Order 12544 violates the non-delegation doctrine to the extent that the agency construes its authority to permit, without due process or judicial review of wrongful conduct, the blocking of personal property of foreign citizens who may transact business legally with companies deemed to be controlled by a country targeted for economic sanctions.

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Petitioner, Chris Paradissiotis, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Paradissiotis v. Rubin*, 171 F.3d 983 (5th Cir. 1999), and is set forth in Appendix ("App.") A hereto at 1a-11a. The opinions of the United States District Court for the Southern District of Texas, affirmed by the Fifth Circuit, have not been reported. The opinions are set forth in their entirety in Appendix B and C hereto at 12a-83a.

STATEMENT OF JURISDICTION

The Fifth Circuit issued its decision on April 1, 1999. This Petition for a Writ of Certiorari is filed within ninety days of this date.

Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petition includes the following constitutional and statutory provisions[1]:

- The International Emergency Economic Powers Act (hereafter "IEEPA"), 50 U.S.C. § 1701, *et seq.*
- Executive Order 12543 (51 Fed. Reg. 875) (1986);
- Executive Order 12544 (51 Fed. Reg. 1236) (1986);

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1. Pertinent portions of some of these materials are printed in the Appendix.

- The Libyan Sanction Regulations (hereafter the "LSRs"), 31 C.F.R. § 550, *et seq.*;
- The Bill of Attainder Clause of the United States Constitution, Const. Art. 1, § 9, cl. 3;
- The First Amendment of the United States Constitution;
- The Fifth Amendment to the United States Constitution;
- The Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

This Petition arises from a decision by the United States District Court for the Southern District of Texas granting Respondents' Motion to Dismiss or in the Alternative for Summary Judgment and denying Mr. Paradissiotis' Motions for Preliminary Injunction and to Allow Discovery. Judge Rosenthal's decision was filed on March 17, 1997, and subsequently reaffirmed by an opinion entered on August 19, 1997, denying Petitioner's Motion to Vacate the Court's March 17 Order. The Fifth Circuit affirmed this decision on April 1, 1999. Pertinent to this Petition, the Fifth Circuit adopted Respondents' position that its construction of empowering statutes and its interpretation of its regulations were entitled to extreme deference, and that Mr. Paradissiotis had not suffered any constitutional injury based upon Respondents' interpretation.

B. Factual Background

The International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701, *et seq.*, authorizes the Executive powers to impose economic sanctions to prohibit and regulate transactions with and property of "*any foreign country or a national thereof*," 50 U.S.C. § 1702(a)(1)(B), and such powers "may *only* be exercised to deal with an unusual and extraordinary threat" to the security or foreign policy of the United States and "may not be exercised for any other purpose." 50 U.S.C. § 1701(b). Pursuant to the IEEPA and in order to punish Libyan support for international terrorism, President Reagan issued two Executive Orders to issue blocking orders, to prohibit United States persons from certain conduct with respect to the Government of Libya, and to authorize the Secretary of Treasury "in consultation with the Secretary of State, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order." Exec. Order 12543. The Secretary of Treasury apparently delegated this authority to the Office of Foreign Assets Control ("OFAC"). On January 16, 1986, OFAC issued Libyan Sanction Regulations ("LSRs") to implement the Executive Orders. 31 C.F.R. § 550, *et seq.*

The pertinent parts of the LSRs as promulgated: (i) prohibit United States persons from performing contracts in Libya, 31 C.F.R. § 550.202; (ii) prohibit United States persons from engaging in transactions with the Government of Libya, or with property in which the Government of Libya has had an interest since 1986, 31 C.F.R. §§ 550.201, 550.203-205, 550.422; and (iii) require United States persons to block all transfers of property in which the Government of Libya has an interest. 31 C.F.R. § 550.209. A license from OFAC is required to proceed with actions prohibited. *See* 31 C.F.R. § 550.517. The LSRs define the "Government of Libya" to include:

> (1) The state and Government of Libya, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Libya;
>
> (2) Any partnership, association, corporation, or other organization owned or controlled directly or indirectly by the foregoing;
>
> (3) Any person *to the extent that such person is*, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, *acting or purporting to act directly or indirectly on behalf of any of the foregoing*;
>
> (4) any other person or organization determined by the Secretary of the Treasury to be included within this section.

31 C.F.R. § 550.304 (emphasis supplied). The LSRs also define "Libyan Person:"

> The term "Libyan Person" means any Libyan citizen, any juridical person organized under the laws of Libya, or any juridical person owned or controlled, directly or indirectly, by a Libyan citizen or the Government of Libya.

31 C.F.R. § 550.305. Significant to this Petition is what the LSRs do **not** do:

- The LSRs do not prohibit United States persons from transacting business with, nor do they require blocking property of, any Libyan Person, except such persons also defined as the "Government of Libya";

- The LSRs do not prohibit United States persons from engaging in business transactions with, or require blocking property of, persons not owned or controlled by the Government of Libya (such as companies or partnerships in which the Government of Libya owns a minority interest or lacks control);

- The LSRs do not prohibit any foreign persons, including foreign subsidiaries of United States corporations, from engaging in business with the Government of Libya;

- **The LSRs do not prohibit United States persons from engaging in transactions with, nor require blocking property of, foreign persons who legally engage in business with the Government of Libya**.

On January 7th and 8th, 1986, when President Reagan declared a national emergency under the IEEPA, Mr. Paradissiotis, a citizen of Cyprus domiciled in London, had been working for several years as an accountant and then executive manager of Holborn Oil Trading Limited ("HOTL"), a downstream and offshore subsidiary of The Coastal Corporation ("Coastal"), a Delaware corporation engaged in the energy business. HOTL had been involved in complex business interests with companies in which the GOL had an interest. Pursuant to his employment with HOTL and Coastal, Coastal awarded Mr. Paradissiotis options in 2,250 shares in Coastal common stock *prior* to the issuance of the 1986 Executive Orders. The options had an expiration date of March 19, 1997. Mr. Paradissiotis also had purchased and owns stock in Coastal.

After 1986, OFAC issued from time-to-time a list of "Specifically Designated Nationals," or "SDNs" in the Federal Register that identified numerous corporations and entities that were owned or controlled by the Government of

Libya ("SDN List"). On August 5, 1991, OFAC first listed individuals (including Petitioner), as SDNs, naming 21 individuals to the SDN List as "individuals whom the Director of [OFAC] has determined to be acting or purporting to act directly or indirectly on behalf of the Government of Libya." 56 Fed. Reg. 37156 (Aug. 5, 1991). In that publication, OFAC also listed as SDNs two foreign corporations that are minority owned by HOTL and in which Mr. Paradissiotis serves as an officer. The term "Specially Designated National" was not added to the LSRs until March 10, 1993, some 18 months after Mr. Paradissiotis was named as a SDN. 58 Fed. Reg. 13198 (March 10, 1993). Before and after 1991, OFAC did not challenge that the conduct of Petitioner was not prohibited by the LSRs; stated simply, Petitioner has *never* engaged in any illegal conduct prohibited by the LSRs.

After meetings and correspondence with OFAC, Coastal learned that OFAC interpreted the SDN List as causing each listed individual to be the Government of Libya for purposes of the LSRs. From January 1993 through December 1996, Petitioner applied repeatedly to OFAC for licenses so that he could sell his personal stock and exercise his Coastal stock options, receive medical treatment in the United States, and consult United States legal counsel. All of these license requests were either unanswered or denied. In one reply to a license request, the Director of OFAC explained "because Mr. Paradissiotis was determined to be an SDN, all financial dealings with him were deemed to be dealings with the Government of Libya." Petitioner also requested from OFAC the publication of standards for being named to or removed from the SDN List, which was similarly denied. In a 1995 denial of one of Petitioner's requests for a license to exercise his stock options and sell his stock, OFAC suggested that Mr. Paradissiotis should apply for a license to exercise the transfer and place the proceeds into a blocked account. During the pendency of this case, Petitioner applied for such

a license to prevent the expiration of the options. OFAC denied that license request.

OFAC interpreted its LSRs to deny Petitioner, as an SDN, legal representation by United States counsel without a license, except to provide advice for complying with the LSRs. A license was required before United States lawyers could be paid or provide counsel for any other reason. OFAC licensed Petitioner to pay United States legal counsel to pursue this challenge to the application of the LSRs, OFAC denied his license requests made through 1996 for access to United States counsel for his business dealings as an HOTL corporate officer engaged in international transactions and for personal purposes. On March 10, 1993, OFAC reinterpreted its regulations and accordingly amended them to expressly prohibit legal representation with respect to "contract performance" or "business dealings" and any legal service that would "benefit" an SDN and any legal services rendered "on behalf of . . . or with respect to property interests of the Government of Libya." 31 C.F.R. §§ 550.422, 550.517. This amendment was added after a court prohibited OFAC from seizing HOTL privileged documents and ruled that providing legal services to HOTL and Mr. Paradissiotis was not prohibited by the LSRs, as OFAC had interpreted. *Looper v. Morgan*, C.A. No. H-92-0294, slip opinion at 27-28 (S.D. Tx. June 30, 1995).

Following these denials and refusals, Petitioner filed suit seeking declaratory relief. Petitioner also sought to take discovery for numerous evidentiary reasons, including: (i) to prove his qualification for the safe harbor of 50 U.S.C. § 1702(a)(3); (ii) to establish that there was no advance publication of the OFAC application of the SDN List; and (iii) to illustrate the arbitrary and capricious nature in which OFAC selectively interprets and enforces its regulations. Petitioner's motions were denied, and the District Court granted OFAC's Motion for Summary Judgment in its

entirety. The Fifth Circuit affirmed the District Court's decision, except for one portion relating to Petitioner's Fifth Amendment takings argument. This portion of the District Court's opinion was vacated for lack of jurisdiction, as the Fifth Circuit held that the United States Court of Claims had exclusive jurisdiction over this portion of the controversy.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT PURPORTED TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHETHER THE SDN LIST, AS TO INDIVIDUALS, CONSTITUTES A BILL OF ATTAINDER.

The Petition should be granted as a matter of constitutional first impression. OFAC issues a new bill of attainder with every new individual's name that it publishes in the Federal Register to the SDN List. OFAC's dramatically increasing use of the SDN List makes its application an important issue that should compel this Court to settle whether this federal law as applied to Petitioner is in violation of the ban against bills of attainder and whether procedural safeguards and standards should apply to restrict OFAC's use of discretionary power.[2] The court below would not

2. The Director of OFAC in the record admits: "the use of the SDN List has become an increasing tool in the arsenal against terrorism." Shrouding the policy issue with inflammatory tags should not obviate the need for Supreme Court review. "[T]he attainder ban cannot be rendered inapplicable simply because a law designating an identifiable class of individuals for punishment might be recharacterized as a prophylactic measure enacted to serve some legitimate end." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-6, 644 (2d ed. 1988). The executive (Cont'd)

challenge the blacklisting power, exercised by the Executive with unbridled discretion, in selectively naming individuals — foreign citizens not nationals of Libya — to the SDN List. Unless this Court prohibits this practice or expresses guidance on the standards, if any, that must be followed, OFAC can increasingly use the SDN List against foreign individuals as a tool to coerce its policy when neither Congress nor the Executive Branch ("Executive") can muster the support to declare in advance the conduct to be punishable.

Naming Mr. Paradissiotis as an SDN had the immediate and inescapable effect, without a trial or even appellate review, of criminalizing his future acts due to his prior legal conduct, blocking all of his property and property rights with a United States nexus, and destroying his terminable contract rights that had no nexus to the target country of Libya. This was done despite the fact that Petitioner was and is in compliance with the LSRs and has not been accused of any wrongful conduct.

If an Executive agency were to assume the power to list United States citizens who are engaged in *lawful* conduct, although in opposition to an Executive *policy*, with the result that the bank accounts and private property of the individual were thereafter frozen for an indefinite period, the action certainly would comprise an unconstitutional bill of attainder. Therefore, the only rule of law that the court below effectively decided is that the President's foreign policy powers override the ban against bills of attainder.

The court below asserted three bases for refusing bill of attainder treatment. First, the Fifth Circuit correctly noted

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(Cont'd)
branch is prohibited from promulgating regulations which inflict injury on a particular person without affording the procedural safeguards of a judicial trial. *Id.* at 657.

that "no circuit court has yet held" that the regulations of an Executive agency are legislative acts. [App. A at 9a]. A concurring opinion from this Court, however, states that the ban against bills of attainder also applies to the Executive: "I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution." *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 144, 71 S. Ct. 624, 634 (1950); *accord Rodriguez v. United States Parol Comm'n*, 594 F.2d 170, 173-74 (7th Cir. 1979); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2 (2nd Edition 1978).[3]

Secondly, the court below questioned any applicability of the ban to foreign persons. To the extent the Fifth Circuit intimated that the attainder ban does not apply to foreign persons, its opinion conflicts with judicial review rendered in a prior opinion of this Court. *Fleming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367 (1960) (denial of social security benefits to foreign aliens, members of the communist party, is a reduced government benefit and not punishment); *accord Mendelsohn v. Meese*, 695 F. Supp. 1474, 1478, 1488 n.24 (S.D.N.Y. 1988) (the ban applies to non-citizens, but the PLO is a corporation).

Thirdly, the court below ruled that the "mere publication of his name in the list did not evince an 'intent to punish' . . . [and] no concomitant burden was imposed based solely on his inclusion in the SDN list." [App. A at 10a]. Both of these statements are belied by the unopposed record and

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3. The IEEPA was a congressional attempt to limit the Executive's power to declare a national emergency in times of peace. *See Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972 (1981); Note, the INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: A CONGRESSIONAL ATTEMPT TO CONTROL PRESIDENTIAL EMERGENCY POWER, 96 Harv. L. Rev. 1102 (1983).

substantial common law authority.[4] This conclusion is reached by the Fifth Circuit in the context of foreign policy delegation. The court below granted deference to OFAC's construction of the IEEPA and interpretation of the LSRs, which effected an assertion of complete Executive power over the property and actions of any foreign individuals who act for a company OFAC deems to be controlled by the Government of Libya.

Thus, the opinion below departed from opinions of this Court in all three separate areas, each of which provides an independent basis for granting the Petition. Moreover, the court below accepted OFAC's justification for the SDN List. [App. A at 6a]. However, the pronouncement of a broad governmental purpose is not sufficient in bill of attainder cases to negate the existence of punishment. Instead, existing judicially recognized purposes should establish the standard, and there must be "an adequate nexus between the restriction imposed and the legitimate governmental purpose." *Dehainaut v. Pena*, 32 F.3d 1066, 1072 (7th Cir. 1994).

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4. With respect to intent to punish, the Director of OFAC in the record states that if the personal financial transactions of SDNs were authorized, "the United States Government would lose all leverage and flexibility in *deterring* SDNs from advancing the goals of the GOL." The Supreme Court rejected a similar government defense that a law is not a bill of attainder if the purpose is preventive rather than retributive, stating: "Punishment serves several purposes; retributive, rehabilitative, deterrent and preventive." *United States v. Brown*, 381 U.S. 437, 458, 85 S. Ct. 1707, 1720 (1965) "[T]he incapacity of political bodies . . . [is] at its peak when they seek to decide which specific individuals deserve to be deprived of some opportunity." TRIBE, *supra* at 658 n.8.

The actual punishment here, the types and substance of which were supported by case law to both lower courts, is apparent; OFAC even refused to allow Petitioner to exercise the options and place the proceeds in a blocked account, resulting in a complete loss of the property.

Blocking personal property was one of the types of punishment. The opinion of the court below ignores the cited common law recognizing permissible purposes for upholding blocking orders: (i) "preserving the assets involved for possible use in some satisfaction of American claims against the country involved," *Nielsen v. Secretary of Treasury*, 424 F.2d 833, 840 (D.C. Cir. 1970); (ii) using the blocked funds "as a 'bargaining chip' to be used by the President when dealing with a hostile country," *Dames & Moore v. Regan*, 453 U.S. 654, 673, 101 S. Ct. 2972, 2983 (1981); and (iii) depriving the target government of the benefit of its property, *Propper v. Clark*, 337 U.S. 472, 493, 69 S. Ct. 1333, 1345 (1949).

Interpreting the LSRs to permit the blocking of Petitioner's retirement funds and even the intentional destruction of his personal stock options does not satisfy these purposes. Instead, the court below accepted the purpose as stated by the Director of OFAC: "Its purpose is to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the Government of Libya." [App. A at 6a]. The court below then endorsed OFAC's interpretation to permit bills of attainder to seize assets against "any person who has acted," and explained that it was "[g]ranting OFAC the extent of deference that is due. . . ." *Id.*

Case review of similar applications — naming people to "blacklists" because of their unpopular political beliefs and immediately denying them access to their personal property — appear rarely in judicial analysis. The government explained such infrequency as being due to demanding elements needed to establish a bill of attainder; instead, bill of attainder cases are rare because Congress would never conceive of creating such a "blacklist." For example, Congress knows to avoid such a situation, as it sought a constitutionally sound method for sanctioning

terrorist organizations in the only legislation similar to the LSRs, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[5]

To the contrary, OFAC legislates at will a new economic sanction with each SDN named as the Government of Libya, effecting a bootstrap application to all dealings of the individual as if the Executive Orders specifically named him. This is achieved by an arbitrary process, using expansive interpretations of the IEEPA and its own LSRs, without judicial review.

This Court should determine whether the constitutional ban against bills of attainder prohibits such action as to individuals. This Court should settle whether safeguards or standards should be imposed against which OFAC's licensing process and SDN designation could be measured, or this Court should establish intelligible principles for how OFAC may publish and apply such a list. The safeguard embedded in the ban on bills of attainder is judicial review. Due process

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5. 8 U.S.C. § 1189. Under the AEDPA, Congress authorized the Secretary of State to designate a "foreign terrorist organization;" provided the Secretary creates an administrative record with enumerated conditions and gives seven days advanced notice of the intended designation to Congress. *Id.* § 1189(a)(2)(A). AEDPA authorizes to block assets of the designated foreign terrorist organization, but that authority *does not extend to the assets of individual* members of the foreign terrorist organization. *Id.* § 1189(a)(2)(C). A designation under AEDPA is effective for a period of two years and may be redesignated for only an additional two years. *Id.* § 1189(a)(4). The designated organization is afforded the right to seek judicial review of the designation. *Id.* § 1189(b)(1). To the contrary, OFAC maintains that it has the unfettered right to designate and punish Petitioner as an SDN indefinitely and that Petitioner has no judicial recourse to determine the merits of his continued designation, to enjoy his personal property or conduct personal business, or even to seek legal counsel.

should require standards for promulgating "blacklists" at an Executive agency level with such serious property and liberty effects.

II.

THE DECISION OF THE FIFTH CIRCUIT PASSED ON AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHAT STANDARDS SHOULD APPLY TO AN EXECUTIVE AGENCY'S LICENSING SCHEMES THAT ESTABLISH PRIOR RESTRAINTS ON ACCESS TO LEGAL COUNSEL.

After OFAC defined Mr. Paradissiotis as the Government of Libya for all purposes, OFAC interpreted its LSRs as denying an SDN access to counsel without a license. Petitioner's lawsuit alleged that OFAC's regulations and arbitrary licensing process prevented him from accessing legal counsel in violation of his constitutional rights. The District Court found that Petitioner lacked standing, and the Fifth Circuit affirmed this decision with:

> Third, although Paradissiotis persists in contesting OFAC's regulations requiring the issuance of a license before a SDN may retain legal counsel, he lacks standing. OFAC granted his only request for a license to obtain counsel, and Paradissiotis has not shown that he will be deprived of legal services in the future based on the regulations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992).

[App. A at 10a-11a].[6]

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6. The Fifth Circuit was simply wrong in its belief that OFAC had granted Petitioner's "only request," borrowed from the District Court's Order, but this factual error is irrelevant. OFAC only granted (Cont'd)

The Fifth Circuit's opinion as it relates to standing failed to recognize that Petitioner's situation is capable of repetition, yet evading review, and hence falls squarely within the holding of *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982) (per curiam). OFAC approves and denies license applications with no time limits and no published guidelines. Petitioner undoubtedly will need timely United States legal counsel in the future for international transactions in which his company is involved, and he will suffer the same impediments to access of legal counsel. Petitioner also meets the criteria for a facial challenge of this interpretation had he not had license applications denied. Petitioner has standing to pursue this matter before this Court, and to the extent the Fifth Circuit's opinion on standing conflicts with numerous opinions of this Court, as well as the various Courts of Appeals, it further provides an independent basis to grant the Petition under Sup. Ct. R. 10.

Petitioner's argument below presented four discrete constitutional justifications for determining that OFAC cannot deny him access to counsel: (i) the LSR's interfere with Petitioner's right to "Petition the Government for a redress of grievances" (First Amendment); (ii) the LSRs permitted OFAC to selectively delay or disqualify Petitioner's counsel (Sixth Amendment); (iii) the licensing process requires forced disclosure of contemplated and past conduct as prerequisites for receiving a license (Fifth Amendment);

(Cont'd)

a license for payment of United States counsel to prosecute this action. OFAC acknowledges in the record that Petitioner made several license requests for authority to consult United States legal counsel in connection with transactions in which he was involved personally and in his corporate capacity as a HOTL officer. OFAC denied the license requests, demanding specific disclosures of the transactions and advice requested before reconsideration. This arbitrary and lengthy procedure extends far beyond the ordinary time constraints for business transactions.

and (iv) disclosure to OFAC in the license process prevents candor and full disclosure between Petitioner and his chosen attorney (limiting the attorney-client privilege).

Petitioner's contention that he is entitled to protection of these four constitutional rights finds support in the decisions of this Court as well as the Courts of Appeals.[7] Petitioner cited authorities to the courts below to establish that even as a foreign person, he is entitled to these constitutional protections because there is a sufficient nexus.[8]

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7. *See Glasser v. United States*, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). This Court has recognized that even sophisticated foreign clients, who "constantly go to lawyers to find out how to obey the law," should have unimpeded access to counsel faced with the complexity of regulatory schemes. *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (recognizing attorney-client privilege for foreign companies); *see also Civil Aeronautics Bd. v. Air Transp. Ass'n. of Am.*, 201 F. Supp. 317, 318 (D.D.C. 1961) (stating "[i]n order to abrogate [the attorney-client privilege] in whole or in part as to any proceeding whatsoever, affirmative legislative action would be required that is free from ambiguity."); *United States v. Harvey*, 814 F.2d 905, 925 (4th Cir. 1987) (holding applications of the law which effectively deprive the ability to retain private counsel on any basis other than sham and fraud participated by counsel involve arbitrary action by government against which the Sixth Amendment provides protection.).

8. *E.g., In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (applying privilege in LSR case to a foreign company). The only "access to counsel" case cited by Respondent was *Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir.), *cert. denied*, 516 U.S. 913 (1995). That Court refused detained Haitians access to counsel where their only nexus to the United States was their situs on a naval base in Cuba, because the consultation was requested solely to "engag[e] litigation as a form of political expression" with no showing of "an underlying legal claim." 43 F.3d at 1429.

There is no doubt but that OFAC's decision to list Petitioner as an SDN drastically interferes with Petitioner's right of access-to-counsel. OFAC asserted that its foreign policy power exercised through the LSRs permitted OFAC to abrogate Petitioner's right of access-to-counsel. OFAC further asserted that its licensing mechanism is an adequate review process for permitting access-to-counsel. To the courts below, OFAC asserted that its decision to grant or deny and revoke licenses is wholly within its discretion, not subject to appeal, and not governed by any known "judicially manageable standards," citing *Heckler v. Chaney*, 470 U.S. at 828-30, 105 S. Ct. 1654-55 (1985) (holding that Administrative Procedures Act does not require review where agency is delegated discretion with no standards). OFAC can (and did on one license application from Petitioner and one from Coastal) sit on a license request indefinitely and refuse to answer it, leaving the applicant with absolutely no recourse. Thus, it is undisputed that Petitioner's constitutional right of access-to-counsel is left to the unbridled discretion of an unknown, unnamed OFAC functionary.

In a factual context that is remarkably similar to this instant case, the Ninth Circuit in *Bernstein v. United States Department of Justice*, No. 97-16686, 1999 WL 274111 (9th Cir. May 6, 1999), applied *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759, 108 S. Ct. 2138, 2146-52 (1988) and determined that part of the State Department's Export Administration Regulations ("EARs") were facially invalid as a prior restraint against the First Amendment. *Bernstein*, at *9. The similarities between the EARs and the LSRs are significant:

- Both find their underpinnings in the executive's national security and foreign policy powers;

- Both require license applications be submitted to executive agencies before certain actions may be taken;

- Both leave the decision as to whether to grant the license within the unbridled discretion of an agency, and place no constraints on the agency in approving or denying the license;

- Both impose no time limits on the agency's decision to approve or deny the license;

- Neither grant a denied applicant any recourse to determine why the license is denied.

See Bernstein, at *3, *affirming Bernstein v. United States Dep't of State*, 945 F. Supp. 1279, 1289-90 (N.D. Cal. 1996). In essence, both regulatory schemes are "paradigms of standardless discretion." *Id. Bernstein* had little trouble determining that the licensing process of the EARs was an unconstitutional prior restraint of First Amendment rights under *Lakewood* and could not be applied to prevent Bernstein's publishing of his encryption software. *Id.* at *11.

Petitioner recognizes that *Bernstein* was applying "prior restraint" standards previously espoused by this Court in the free speech context of *Lakewood.* Nevertheless, the right of access-to-counsel is a similarly protected, similarly founded fundamental constitutional right. *Bernstein* recognized that the standardless discretion of the EARs licensing scheme also implicated other constitutional protections, including the Fourth Amendment (right to privacy), the right against compelled speech, and the right to information privacy. *Id.* at *9. While leaving these constitutional questions for another day, *Bernstein* noted that the EARs not only effected "scientists laboring in an esoteric field, but also touches on the public interest broadly defined." *Id.* Similarly, OFAC's

promulgation of the LSRs and its licensing scheme as applied touches on the public interest and constitutional guarantees (First, Fifth and Sixth Amendment) relating to access of counsel.

The District of Columbia Circuit has previously rejected OFAC's interpretation of its regulations to require a license before a Cuban SDN could form an attorney-client relationship. *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 874 (D.C. Cir. 1984). *American Airways* explained: "When we add to our consideration the constitutional dimension plaintiff's access-to-counsel plea entails, we find the case against OFAC's position overwhelming." *Id.* at 873-74. In the ensuing fifteen years since *American Airways*, OFAC has worded its LSRs more cleverly but continues to regulate SDNs' access-to-counsel "bounded by no standards that have been presented to us." *Id.*

Where *Bernstein* and *American Airways* recognized the impropriety of regulatory impediments to constitutional rights, *Amusement Devices Ass'n. v. State of Ohio,* 443 F. Supp. 1040 (S.D. Ohio 1977), overturned a similar statutory scheme that interfered with access-to-counsel. In *Amusement Devices*, the Court confronted an Ohio statute that stated:

> No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall . . . furnish legal, accounting, or other managerial services to a criminal syndicate.

Id. at 1049. Finding the right of access-to-counsel had First, Sixth, and Fourteenth Amendment implications, the court entered a declaratory judgment striking down that part of the statute. The *Amusement Devices* court reasoned:

> [i]t is fundamentally unfair for a state on the one hand to regulate with criminal sanctions certain

> modes of conduct, and on the other hand to enact a penal statute which, because of its breadth and its lack of definition, discourages the rendering of legal services to persons in the regulated field.

Id. at 1053. Here, OFAC's designation of Petitioner as a SDN places him within the regulated field and indisputably discourages and limits his ability to retain and consult United States legal counsel. The LSRs impose a prior restraint on access-to-counsel without standards. The LSRs contain absolutely no constraints on OFAC's discretion to grant or deny a license, resulting in a violation of Petitioner's First, Fifth and Sixth Amendment rights and his attorney-client privileges.

Absent guidelines and constraints, OFAC will continue to infringe upon the four underpinnings of Petitioner's constitutional rights and the rights of others similarly situated. It is the province of this Court to either declare the offending provisions of the LSRs unconstitutional, or to give guidance for a proper construction of OFAC's delegated authority that protect Petitioner's constitutional rights. The Fifth Circuit passed on this difficult issue in its erroneous decision that Petitioner lacked standing. This Court and the circuits have affirmed the importance of the constitutional right of access-to-counsel. Petitioner is asking for standards, similar to the requirements of *Lakewood*, to limit or measure acceptable agency prior restraint. This important issue of federal law is one of first impression, and has not, but should be, decided by this Court.

III.

THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND THE NINTH CIRCUIT THAT STATE AN AGENCY'S INTERPRETATION IS ACCORDED NO DEFERENCE WHEN ITS INTERPRETATION RAISES SERIOUS CONSTITUTIONAL ISSUES.

This Petition implicates OFAC's construction of its delegated authority in the IEEPA, OFAC's interpretation of the meaning of 31 C.F.R. § 550.304(c), and OFAC's application of its promulgated SDN List, all as they relate to Petitioner. The court below applied a standard of extreme deference to the agency interpretation, accepting OFAC's interpretation since it was not plainly inconsistent with the language. There is a conflict between the circuits as to the proper deference to be afforded the agency interpretation, which Petitioner requests that the Supreme Court resolve.

Petitioner asked the court below to construe the language's natural and plain meaning, consistent with the judicially recognized purposes of blocking orders. Furthermore, Petitioner's position is that OFAC's interpretation is overly broad and ignores the limiting "to the extent" language in the LSRs. Moreover, Petitioner contends that a proper construction of the IEEPA would not permit the LSRs to sanction the personal property and non-Libyan related business of individuals who are not Libyan nationals. Petitioner read his designation to the SDN List as constructive notice; *i.e.*, the LSRs impose restraints on United States persons, and LSRs penalties are assessed on *mens rea* requirements, so the burden should rest with the United States person dealing with Petitioner to determine if the SDN is acting in the transaction in a capacity on behalf of or to benefit the Government of Libya. Petitioner's interpretation was rejected by OFAC in its several license denials, the

district court in its Order and Reasons, and the Fifth Circuit. It is undisputed that but for the application of OFAC's interpretation, Petitioner's personal property could not be blocked and he would not be subject to the various punitive measures contained within the LSRs.

Pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984) and *Consarc Corp. v. United States Treasury Dept., Office of Foreign Assets Control*, 71 F.3d 909, 914 (D.C. Cir. 1995), the Fifth Circuit held that OFAC's interpretation was not unreasonable (applying the *Chevron* standard) nor was it plainly inconsistent with the regulation (applying the *Consarc* standard). [App. A at 6a].

The Fifth Circuit permitted OFAC to construe the IEEPA as authorizing discretionary blocking against nationals of any country instead of the targeted Libya "and nationals thereof." Thus, the Fifth Circuit adopted "OFAC's interpretation of the language to broadly cover 'any person' who has acted or purported to act on behalf of the government of Libya. . . ." [App. A at 6a-7a]. The result is to empower OFAC to make the SDN, rather than the Government of Libya, the target of the sanctions and block his personal property. Under OFAC's interpretation, the economic sanctions apply to Petitioner and his personal property for all business affairs and not only "to the extent" he acts for the Government of Libya or an SDN company. The Fifth Circuit also adopted OFAC's argument that the "to the extent" language, because it was contained in the definitional section of the LSRs and not again contained in the prohibition section, would not apply to the instant case. To say that the definitional section of a regulation does not apply to the entire regulation underscores the effort the Fifth Circuit made to adopt OFAC's strained interpretation of the LSRs. When construing a regulatory scheme, the court should give effect to the entire regulation, and not read certain parts in isolation.

Hilton v. Southwestern Bell Tel. Co., 936 F.2d 823, 828 (5th Cir. 1991). As explained in Issue I, *supra*, for other purposes, the court below accepted OFAC's broad "widest possible net" purpose for blocking Petitioner's property rather than analyzing the inconsistency with judicially recognized purposes, which are restrictive.

In its analysis of the LSR at issue here, the Fifth Circuit adopted a dual-test of both *Chevron* and *Consarc*. *Chevron*, which apparently applies to agency interpretations of statutes, requires that the agency interpretation not be "unreasonable." *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2781-83.[9] *Consarc*, which apparently applies to agency interpretation to regulations promulgated pursuant to the agency's rulemaking authority, requires that the agency interpretation not be "plainly inconsistent" with the regulation. *Consarc*, 71 F.3d at 915. Although this case would appear to be a candidate for guidance under the Administrative Practices Act ("APA"), the Fifth Circuit instead chose to use *Consarc* and *Chevron*, although those deference standards apply to different interpretation scenarios. The agency interpretations in question in *Chevron* and *Consarc* did not pose potential constitutional problems.

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9. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927 (1998), which states: "If we determine that Congress has not directly spoken to the precise question at issue, we then inquire whether the agency's interpretation is reasonable." *Id.* at 939. Although *National Credit Union* may have narrowed *Chevron* by saying that the agency's interpretation must be reasonable, rather than "not unreasonable" the interpretation in question in *National Credit Union*, as in *Chevron*, was not one that violated constitutional claims. *Id.* at 938-39.

The Fifth Circuit's decision is squarely in conflict with the Ninth Circuit as well as decisions from this Court. In *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), the Ninth Circuit confronted the issue of "[t]o what extent is a court bound to defer to an agency's interpretation where that interpretation raises difficult constitutional questions?" *Id.* at 661. Guided by *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 108 S. Ct. 1392 (1988) and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759 (1991), the *Williams* court concluded that if the alternative interpretation raised "serious constitutional questions," the agency's interpretation is accorded no deference under *Chevron*. *Id.* at 662. The *Williams* court resolved the issue by interpreting the statutory clause in such a manner as to avoid confronting the difficult constitutional issues, consistent with this Court's holding in *DeBartolo Corp. Id.* at 666.

Williams rationale is supported by underpinnings of the *Chevron* decision. *Chevron*, which apparently eschewed the APA in favor of a common-law approach to agency interpretation, found that deference to agency interpretation was warranted: (i) because Congress had delegated interpretative authority to the agency; and (ii) because the agency has superior expertise in the particularly area of its interpretation. *Chevron*, 467 U.S. at 843, 844, 104 S. Ct. at 2782. The balance of expertise envisioned in *Chevron* necessarily shifts from the agency to the courts when a constitutional line is about to be crossed. *Williams*, 115 F.3d at 662 (citing *The Supreme Court, 1990 Term-Leading Cases*, 105 Harv. L. Rev. 177, 398 (1991), stating "When constitutional rights are implicated . . . , the balance of values shifts against agency interpretation."). Petitioner submits that the issues presented in the LSRs resulting in denial of individual rights require no technical expertise. Although the agency is authorized with foreign policy expertise, the judiciary is charged exclusively with responsibility for

protecting constitutional rights. OFAC has completely stepped over this line in not only its forced interpretation of § 550.304 and overbroad construction of the IEEPA, but also with regard to its application of the SDN List "blacklist." Use of the SDN List as constructive notice to shift the burden to United States persons, rather than as fiat for selectively blocking personal property or for coercing foreign persons, seems the more reasoned interpretation.

As recognized in *Williams*, whether OFAC's interpretation is entitled to either *Chevron* or *Consarc* deference turns on the seriousness of the constitutional doubts its interpretation raises. As argued herein, whether the SDN "blacklist" constitutes a bill of attainder is alone sufficient to warrant a departure from *Chevron* or *Consarc*'s deference standard under *Williams*. Similarly, the fact that the LSRs impermissibly interfere with Petitioner's constitutional right of access-to-counsel unfettered by government interference also brings this case within *Williams*. Other constitutional issues that were argued to the District Court and the Fifth Circuit illustrate the severity of the constitutional issues raised by OFAC's interpretation:

- Whether naming Petitioner to the SDN List and applying the prohibitive measures of the LSRs, to block and destroy his property for prior legal conduct, operated as an *ex post facto* law in violation of the United States Constitution;

- Whether OFAC's decision to deny Petitioner's license request to exercise his private stock options to a blocked account was an unconstitutional taking in violation of the Fifth Amendment;

- Whether certain language in the LSRs as interpreted prohibiting legal services is unconstitutionally vague;

- Whether the standardless licensing scheme and inescapable result of SDN designation, without notice or a hearing, violates due process of law requirements.

In contrast to the Ninth Circuit in *Williams*, the Fifth Circuit opinion in this case rejected Petitioner's argument that the proper interpretation for applying the SDN List must avoid constitutional implications. Instead, the court below accorded OFAC's interpretation extreme deference under *Chevron* and *Consarc*. The split of the circuits resulting from the Fifth Circuit's decision should now be resolved by this Court.

IV.

THE DECISION OF THE FIFTH CIRCUIT PURPORTED TO DECIDE AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT: WHETHER OFAC'S INTERPRETATION OF THE IEEPA AND EXECUTIVE ORDERS EFFECTED AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER.

The decision below accorded OFAC "extreme deference" to its interpretation of the LSRs and the IEEPA. The court below accepted OFAC's broad construction of its authority from the IEEPA and Executive Orders to constitute an unrestricted delegation of power to extend to foreign individuals who even are "suspected of being actors directly or indirectly on behalf of the Government of Libya." [App. A at 6a]. The court below thus granted OFAC its assumed authority to use the SDN List and apply the LSRs to the liberty and property of any nationals of any country. Whether OFAC's usurpation of complete power over the non-Government-of-Libya-related activities and property of Petitioner is an extension of a proper construction of the IEEPA and Executive Orders should be resolved by the Court.

This Court's long standing federal law requiring an agency's power to be confined to its delegated authority, *Ruiz v. Morton*, 462 F.2d 818 (9th Cir. 1972), *aff'd*, 415 U.S. 199, 94 S. Ct. 1055 (1974), should be applied to examine the economic sanctions imposed, as they might apply to Petitioner and non-Libyan nationals. The use of "blacklists" to impose penalties on foreign persons presents an important federal question of whether such authority was delegated to OFAC.

In the last ten years, the Executive has dramatically increased its exercise of foreign policy enforcement through complex sanction regulations, promulgated with varying degrees of application and distinctions for each country targeted. The IEEPA authorized the Executive to promulgate against "any foreign country or its nationals" economic sanctions, which "may only be exercised to deal with an unusual and extraordinary threat . . . and may not be exercised for any other purpose." 50 U.S.C. § 1701(b). While the Cuban regulations blocked the property of both the country of Cuba and its nationals, 31 C.F.R. § 515.305, the LSRs only blocked the property of the Government of Libya and not its nationals. Neither the Executive nor Congress have legislated to prohibit or punish any person in other countries from continuing to engage in business with the targeted Government of Libya, nor have they prohibited United States persons from doing business with such persons. The LSRs did not advise Petitioner that lawfully continuing to work for his employer would result in the blocking of his property. OFAC has circumvented the need for such law by construing its power to selectively name foreign persons, nationals of other countries, who may work with the Government of Libya. Thus, OFAC effectively promulgates a new sanction law with each person whom OFAC decides to name as an SDN. Petitioner questions whether this was an intended delegation of power to OFAC.

A recent opinion of the District of Columbia Court of Appeals examined this additional basis for this Court to grant the Petition. In *American Trucking Assoc., Inc. v. United States Environmental Protection Agency*, No. 97-1440, 1999 WL 300618 (D.C. Cir. May 14, 1999), the Court determined that the Environmental Protection Agency ("EPA") effected an unconstitutional delegation of legislative power by failing to articulate intelligible principles relating to air quality. *Id.* at *2. *American Trucking* applied the non-delegation doctrine to require an agency's construction of its powers to provide "intelligible principles" by which its interpretation can be measured. *American Trucking* reasoned "[i]f the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily." *Id.* at *6.

Ruiz v. Morton held that an administrative agency "has no power to create a rule or regulation that is out of harmony with the statutory grant of its authority." *Ruiz*, 462 F.2d at 822. Although the Fifth Circuit did adhere to *Ruiz v. Morton* in an earlier sanction case, *Real v. Simon*, 510 F.2d 557, 564, *reh'g denied* 514 F.2d 738 (5th Cir. 1975), the Fifth Circuit in Petitioner's case, twenty-four years later, allowed the deference rules of *Chevron* and *Consarc* to override consideration of the plain words of limitation in IEEPA and judicially recognized blocking purposes (which purposes are referenced in Issue I, *supra*).

This Petition should be granted to allow this Court to compare the actual grant of authority to OFAC's construction of its authority, which is that OFAC holds unfettered discretion to exercise sanctions over foreign persons like Mr. Paradissiotis. OFAC's power once exercised over non-Libyan nationals is inescapable, except by a license. Petitioner considers the grant of authority to be inconsistent, *inter alia*:

- The IEEPA empowers the Executive, in the event of an unusual threat, to sanction "any country and nationals thereof";

- Executive Orders name the Government of Libya as the only country threat;

- The LSRs published do not sanction foreign person who may outside United States jurisdiction continue business with the Government of Libya; and

- Judicial purposes recognized for the Executive to implement blocking should frame the authority granted.

OFAC's licensing scheme lacks any "intelligible principles" by which Petitioner can navigate the LSR minefield. The arbitrary licensing scheme allows OFAC unfettered discretion in applying the LSRs.

American Trucking recognized that special conditions may justify "an exceptionally relaxed application of the non-delegation doctrine . . . such as the war powers of the President." *Id.* at *5. Maybe some of OFAC's actions are within such "an exceptional relaxed application." Maybe the foreign policy powers of the Executive dictate relaxed standards. Petitioner asks for this Court to establish some standards. The issue that now confronts this Court is whether the foreign policy powers of the Executive permit such a relaxed application of the non-delegation doctrine that Petitioner's right of access-to-counsel, right to be free *ex post facto* laws, and right to be free from bills of attainder may be arbitrarily constrained by OFAC.

This important constitutional issue should now be determined by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED APRIL 1, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20905

CHRIS PARADISSIOTIS,

Plaintiff-Appellant,

v.

ROBERT E. RUBIN,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF TREASURY; ET AL,

Defendants,

ROBERT E. RUBIN,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF TREASURY;
R. RICHARD NEWCOMB,
DIRECTOR OF THE OFFICE OF
FOREIGN ASSETS CONTROL,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Appendix A

Before JOLLY and JONES, Circuit Judges, and LAKE,* District Judge.

EDITH H. JONES, Circuit Judge:

This case involves enforcement of the Libyan Sanction Regulations, 31 C.F.R. §§ 550.101-.803 as they relate to the assets of Chris Paradissiotis, a citizen of Cyprus. Arguing that the Treasury Department's Office of Foreign Assets Control ("OFAC") misapplied the regulations and violated the Constitution, Paradissiotis sought declaratory, injunctive, and monetary relief in the district court. We agree with the district court's essential conclusions that Paradissiotis was validly labeled as a Specially Designated National of the Government of Libya and that his attempt to engage in transactions with property in the United States was validly regulated by the sanctions.

I. FACTUAL AND PROCEDURAL HISTORY

In order to punish Libyan support for international terrorism, President Ronald Reagan issued, under the authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, Executive Orders 12543 and 12544 banning commerce with Libya and freezing all United States property interests of the Libyan Government and its agents. *See* 51 Fed. Reg. 875, 1235 (1986). Pursuant to the orders, the Secretary of Treasury promulgated the Libyan Sanction Regulations, which later Presidents have renewed.

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* District Judge for the Southern District of Texas, sitting by designation.

Appendix A

Through OFAC, the Treasury Secretary oversees the enforcement of the sanction regulations and the licensing procedure which permits covered individuals or entities to avoid the application of the sanctions to a particular transaction.

In 1991, OFAC labeled Paradissiotis a Specially Designated National of Libya pursuant to 31 C.F.R. § 550.304(c). *See* 56 Fed. Reg. 37156 (1991). This designation was based on his service as president and member on the Boards of Directors of Holborn Investment Company Limited ("HICL") and Holborn European Marketing Company Limited ("HEMCL"). Both HICL and HEMCL are subsidiaries of Oilinvest (Netherlands) B.V., which, in turn, is a wholly owned subsidiary of Oilinvest International, N.V., a Libyan state-controlled holding company. By virtue of his connection to these and other Libyan-related entities and, therefore, his direct or indirect actions taken on behalf of Libya, OFAC found that Paradissiotis constituted the Government of Libya ("GOL") for purposes of the sanctions regulations. *See* 31 C.F.R. § 550.304(c). As a specially designated national, Paradissiotis's United States assets were frozen.

From January 1993 through December 1996, Paradissiotis applied repeatedly to OFAC for a license under 31 C.F.R. § 501.801(b)(2) so that he could sell stock and exercise stock options in the Coastal Corporation ("Coastal") and receive the proceeds. Paradissiotis had received this property as President of HOTL, a downstream and offshore subsidiary of Coastal, a Delaware corporation, before the Libyan sanctions went into effect. OFAC

permitted Paradissiotis to retain counsel in this country but denied his requests to conduct any other prohibited transaction.

Paradissiotis then filed suit seeking declaratory, injunctive, and monetary relief for being categorized as a Specially Designated National under the regulations. The district court denied Paradissiotis's request for a preliminary injunction and granted the government's motion for summary judgment. Paradissiotis timely appealed.

II. ANALYSIS

Paradissiotis challenges the scope of the Libyan Sanctions Regulations, their applicability to his conduct, and OFAC's denials of his license requests.[1] Paradissiotis contends that OFAC's interpretation of the regulations was incorrect and exceeded the scope of the authorizing statute and Executive Orders and violated certain constitutional precepts. The Coastal stock options expired during the pendency of this case. Because, however, Paradissiotis still owns Coastal stock that he is prevented from transferring

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1. Our review of the district court's summary judgment is *de novo*, employing the same standards as the district court. *See Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 509 (1998). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 2552-53 (1986); *see also* Fed. R. Civ. P. 56(c).

based on OFAC's interpretation of the regulations, the agency's actions have injured him and remain judicially reviewable. In the Libyan Sanction regulations, the Government of Libya is defined broadly to include

> Any person to the extent such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of [the GOL].

31 C.F.R. § 550.304(c). Citing the phrase "to the extent" as a device of limitation, Paradissiotis first maintains that an individual is included within this regulation only when his actions benefit the GOL, directly or indirectly. Thus, Paradissiotis asserts that the regulations do not regulate "personal" transactions that do not benefit the GOL. The only plain meaning of the regulation, according to Paradissiotis, is that he is the government of Libya when he acts for it, and he "retains a personal sphere of activity free from OFAC regulation" when he does not. As a result, he may transfer property, like the Coastal stock, free of OFAC regulation because he retained the stock while in the "personal sphere."[2]

The federal courts' role in this controversy is circumscribed at two levels. First, OFAC's designation of

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2. If Paradissiotis continues to maintain that his acquisition of property in the United States before the Libyan sanctions were promulgated insulates the property from controls, he is wrong. The regulations expressly applied to all property in the United States at the 1986 effective date. *See* 31 C.F.R. § 550.209(a); 31 C.F.R. § 550.301(c).

Paradissiotis as a specially designated national of Libya, being "an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation." *Consarc Corp. v. United States Treasury Dept., Office of Foreign Assets Control*, 71 F.3d 909, 914 (D.C. Cir. 1995) (internal quotation omitted). *See also*, *Thomas Jefferson University v. Shalala*, 512, U.S. 504, 512, 114 S.Ct. 2381, 2386-87 (1994). Second, a challenge to OFAC's regulation must either demonstrate that the statute clearly forbids the statue's interpretation or that the interpretation is unreasonable. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-83 (1984).

Granting OFAC the extent of deference that it is due, we cannot accept Paradissiotis's argument. Section 550.304(c) is among the definitional provisions in the Libyan sanctions regulations. Its purpose is to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the government of Libya. Unlike Paradissiotis, we do not read the phrase "to the extent" as a limiting device, whereby individuals who otherwise fall within the definition may splice their activities and attempt to avoid the sanctions regulations. Instead, "to the extent" is, in this context, a proxy for "to whatever extent" or "to any extent" and includes rather than excludes subjects from the regulations. Without such language, people might argue that they were independent contractors or brokers or that mere occasional or incidental work for the government of Libya would exempt them from coverage. OFAC's interpretation of the

language to broadly cover "any person" who has acted or purported to act on behalf of the government of Libya is therefore a reasonable interpretation of its regulation, and even an equally reasonable interpretation by Paradissiotis would not prevail.

The spuriousness of appellant's interpretation appears from the facts of his case. He has been for many years president and a director of two companies that are controlled by the government of Libya. In these positions and others he has pursued Libya's efforts to expand its presence in European markets. Yet by semantic casuistry Paradissiotis asserts that even his activities must be analyzed case-by-case for their coverage by the Libyan sanction regulations. So applied, the regulations could hardly be enforced.

This argument also confuses the definitions provision, where the phrase "to the extent" appears, with the "prohibitions" section, which contains no such limitation. *See* 31 C.F.R. § 550.209. In the prohibition section, the regulation states that "no property or interests in property of the government of Libya that are in the United States . . . may be transferred, paid, exported, withdrawn or otherwise dealt in" without a specific license. 31 C.F.R. § 550.209(a). As the district court put it,

> Once a person falls within the definition of the government of Libya, any transaction by that person is prohibited. The language of the regulations does not prohibit transactions only "to the extent" that they benefit the Government of Libya. There is no exception for transactions

> by a person, who falls within the definition of the "Government of Libya," to the extent that a transaction is characterized as in a "personal sphere."

For these reasons, OFAC's interpretation of its own regulation is not plainly inconsistent with the regulatory language, nor is it unreasonable, and in fact it represents the only practical interpretation.

Paradissiotis's additional contention, that the Libyan sanction regulations are inconsistent with governing law and executive orders, is weak. The IEEPA grants the President sweeping powers to prohibit "any person['s]" participation in any transaction involving or the exercise of any right, power, or privilege with respect to any "property in which any foreign country . . . has any interest." *See* 50 U.S.C. § 1702(a)(1)(B). Pursuant to this broad authority, President Reagan authorized a freeze on all property and interests in property of the GOL and its agencies, controlled entities and instrumentalities that are in the United States or hereafter come into the possession or control of U.S. persons. *See* Executive Order No. 12544, 51 Fed. Reg. 1235. The Secretary of Treasury, through OFAC, promulgated such regulations, "including regulations prescribing definitions," as necessary to exercise the President's authority under the Act. *See* 50 U.S.C. § 1704. OFAC was authorized to include individuals like Paradissiotis within its definition of instrumentalities in order to serve the purposes of the Executive Orders. *See also Consarc Corp. v. United States Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 913-14 (D.C. Cir.

1995) (all payments by government of Iraq — not merely those in which Iraq maintains an interest — blocked by analogous OFAC sanctions). In matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations. *Haig v. Agee*, 453 U.S. 280, 292 (1981); *see also Miranda v. Sec. of Treasury*, 766 F.2d 1, 3-4 (1st Cir. 1985).

Paradissiotis raises several constitutional challenges to OFAC's actions. It is not clear whether, as a foreign national residing outside the U.S., he can assert these claims, but we shall assume *arguendo* that he can.

First, he complains that his placement on the SDN list constituted a bill of attainder. No circuit court has yet held that the bill of attainder clause, U.S. Const. art. I, § 9, cl. 3, applies to regulations promulgated by an executive agency. *See Walmer v. United States Dep't of Defense*, 52 F.3d 851, 855 (10th Cir. 1995) ("The bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies."); *Korte v. Office of Personnel Management*, 797 F.2d 967, 972 (Fed. Cir. 1986); *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966). Even if we were inclined to apply the bill of attainder clause to OFAC's list of Specially Designated Nationals, however, the regulatory list would not be invalid.

A bill of attainder must "inflict[ ] punishment on an identified individual without provision of a judicial trial." *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 233 (5th

Cir. 1998). OFAC's list does not inflict such punishment. *See id.* at 233-35. The list identifies a group of individuals that OFAC has deemed subject to various sanction programs and whose business activities with U.S. persons will be regulated as long as they are agents of a target country. Even if he were not on the list, Paradissiotis would still be subject to the generally applicable prohibitions of the Libyan sanction regulations, as OFAC ultimately determined that he fell within the regulatory definition of the GOL. The mere publication of his name in the list did not evince an "intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 851, 104 S. Ct. 3348, 3355 (1984). The SDN list reported Paradissiotis's status under the regulations; no concomitant burden was imposed based solely on his inclusion in the SDN list. The compilation does not violate the Constitution.

Second, Paradissiotis argues that OFAC's application of the Libyan sanction regulations is void for vagueness and does not provide adequate notice to the public of prohibited conduct. Whatever might be true in marginal cases, this challenge is meaningless for Paradissiotis. He knows he is an SDN and is part of the "Government of Libya" and is clearly aware of the consequences of that status.

Third, although Paradissiotis persists in contesting OFAC's regulations requiring the issuance of a license before a SDN may retain legal counsel, he lacks standing. OFAC granted his only request for a license to obtain counsel, and Paradissiotis has not shown that he will be deprived of legal services in the future based on the

regulations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (unless plaintiff can show evidence of concrete, actual or imminent future injury, courts lack standing to consider claims). The district court properly rejected the Sixth Amendment claim for lack of standing.

Fourth, Paradissiotis alleged a Fifth Amendment takings claim because, he asserted, the Coastal Stock options expired in March 1997 while his access to them remained frustrated by OFAC, and he was not compensated. The district court held against him, but it was without jurisdiction. Under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction for all claims for monetary relief against the United States greater than $10,000. Paradissiotis's monetary damages exceed this jurisdictional amount. Consequently, we must vacate this portion of the district court's judgment. See *Wilkerson v. United States*, 67 F.3d 112, 118 (5th Cir. 1995); *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 358-59 (5th Cir. 1987).

III. CONCLUSION

For the foregoing reasons, we *AFFIRM* the district court's grant of summary judgment on all points except the takings claim, and *VACATE* with respect to the takings claim.

AFFIRMED in part, *VACATED* in part.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 18, 1997 AND FILED AUGUST 19, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO.H-96-2314

CHRISTOFOROS PARADISSIOTIS,

Plaintiff,

vs.

ROBERT E. RUBIN, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Christoforos Paradissiotis ("Paradissiotis") has filed a motion to vacate the court's memorandum and opinion of March 17, 1997, or in the alternative, for reconsideration, (Docket Entry No. 53); and a motion for leave to amend his complaint, (Docket Entry No. 55). After a careful review of the pleadings, the motions, the administrative record, the parties' submissions, and the applicable law, this court DENIES plaintiff's motions, for the reasons stated below.

Appendix B

I. The Factual and Procedural Background

The underlying facts concerning the executive orders and regulations made the basis of this lawsuit remain largely undisputed. Docket Entry No. 22, p. 10; *see Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988); *see also Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987), *aff'd*, 851 F.2d 1500 (D.C.Cir. 1988) (table disposition). Plaintiff's challenge is directed to the legal issues analyzed in this court's earlier opinion.

A. The Executive Orders and Administrative Actions

On January 7 and 8, 1986, President Reagan declared a national emergency under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §. 1701 *et seq.*, finding that "the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States." Executive Order No. 12,543. The President issued Executive Order No. 12,543, 51 Fed. Reg. 875 (1986), prohibiting trade with the Government of Libya and its instrumentalities; and Executive Order No. 12,544, 51 Fed. Reg. 1235 (1986), freezing all property and interests in the property of the Government of Libya, its agencies, instrumentalities, and controlled entities that are in the United States or in the possession or control of United States persons.[1]

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1. (Docket No. 23, Tab A, Exs. 1 and 2). The International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, was enacted in 1977 as part of a comprehensive revision of the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 *et seq.*, to clarify

(Cont'd)

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These executive orders authorized the Secretary of the Treasury, in consultation with the Secretary of State, "to take necessary action [and] . . . employ all powers granted [the President] by [IEEPA] to carry out the provision of th[e] Order." Executive Orders No. 12,543 and 12,544. The Secretary of the Treasury delegated his authority and duties relating to the Libyan economic sanctions to the Director of the Office of Foreign Asset Control ("OFAC"). *Cf. Regan v. Wald*, 104 S. Ct. 3026, 3030 n.2 (1984).

On January 16, 1986, the Treasury Department, through OFAC, issued the Libyan Sanctions Regulations ("LSRs"). These regulations implemented the executive orders by regulating commercial and financial transactions with the "Government of Libya," a term defined by the regulations to include entities and persons owned or controlled by, or acting on behalf of, Libya. 31 C.F.R. Part 550. The regulations block transfers of property in which the "Government of Libya"[2] has an interest, if the interest is in

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"the President's authority to regulate international economic transactions during national emergencies" in peacetime. S. Rep. No. 466, 95th Cong., 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. Under the IEEPA, the President is granted wide latitude "to deal with an unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States, if [the President] declares a national emergency with respect to that threat." 50 U.S.C. § 1701(a).

2. The LSRs define the "Government of Libya" to include:

(a) The state and the Government of Libya, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Libya;

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property in the United States or in the possession or control of United States persons. 31 C.F.R. § 550.209.[3]

(Cont'd)

> (b) Any partnership, association, corporation, or other organization owned or controlled directly or indirectly by the foregoing;
>
> (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing;
>
> (d) Any other person or organization determined by the Secretary of the Treasury to be included within this section.

31 C.F.R. § 550.304.

OFAC labels as a Specially Designated National ("SDN") any individual who "is, or has been . . . acting . . . directly or indirectly on behalf of . . . [an organization] owned or controlled directly or indirectly by" the Government of Libya. SDNs of Libya are subject to the same economic prohibitions applicable to the Government of Libya itself.

3. 31 C.F.R. § 550.209, "prohibited transactions involving property in which the Government of Libya has an interest, transactions with respect to securities," provides that:

> (a) Except as authorized by regulations, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Libya that

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"Transactions subject to the prohibitions contained [in the LSRs] which are not authorized by general license may be effected only under specific license." 31 C.F.R. § 550.801(b)(1). OFAC determines whether to grant a specific license on a case-by-case basis and may revoke a previously granted license. 31 C.F.R. § 550.803. If an SDN or other applicant is denied a specific license, the applicant may seek to reopen the application, request an explanation for the license denial, or seek a personal interview with OFAC.

B. The SDN List and this Lawsuit

On August 5, 1991, OFAC designated Paradissiotis an SDN who "is, or has been . . . acting . . . directly or indirectly

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> are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.
>
> (b) Unless authorized by a license expressly referring to this section, the acquisition, transfer (including the transfer on the books of any issuer or agent thereof), disposition, transportation, importation, exportation, or withdrawal of, or the endorsement or guaranty of signatures on or otherwise dealing in any security (or evidence thereof) registered or inscribed in the name of the Government of Libya is prohibited irrespective of the fact that at any time (either prior to, on, or subsequent to 4:10 p.m. e.s.t., January 8, 1986) the registered or inscribed owner thereof may have, or appears to have, assigned, transferred or otherwise disposed of any such security.

on behalf of . . . [an organization] owned or controlled directly or indirectly by" the Government of Libya. 56 Fed. Reg. 37,156 (1991). The designation made Paradissiotis subject to the same economic prohibitions applicable to the Government of Libya. (Docket Entry No. 23, Tab A, pp. 71-72, 77-79, 120, 221).[4]

On January 4, 1993, Paradissiotis notified OFAC that he had retained a United States law firm for "legal advice and counsel concerning the [LSRs] and ancillary matters" and requested confirmation from OFAC that he did not need a license because he was seeking legal advice as an individual and not as a representative of any SDN-designated organization. (Docket Entry No. 23, Tab A, pp. 69-70). On February 2, 1993, OFAC granted Paradissiotis a license to compensate his United States lawyers. (Docket Entry No. 23, Tab A, pp. 68A-68C, License No. 772).

On May 7, 1993, Paradissiotis asked for "clarification or license for individual SDN [Paradissiotis] to conduct personal affairs," arguing that his "designation as an SDN

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4. OFAC designated Paradissiotis an SDN because of his position as president and board member of two SDN-designated entities, Holborn Investment Company Limited ("HICL"), and its wholly-owned subsidiary, Holborn European Marketing Company Limited ("HEMCL"). Both HICL and HEMCL are subsidiaries of Oilinvest (Netherlands) B.V. ("Oilinvest B.V."). Oilinvest B.V. was itself wholly owned by Oilinvest International, N.V., ("Oilinvest International"), a Libyan state-controlled holding company that is the principal investment arm of the Government of Libya. (Docket Entry No. 23, Tab A, pp. 71-72, 77-80, 83, 89, 112, 114-17, 120, 137, 221, 352-53). Paradissiotis does not dispute the extent or duration of his involvement as an officer or director of companies directly or indirectly controlled by the Government of Libya.

should not cause the application of [the LSRs] to restrict his personal affairs and private business affairs to the extent he is not acting on behalf of . . . any company owned or controlled by the [Government of Libya]." (Docket Entry No. 23, Tab A, p. 66). On May 17, 1993, OFAC responded that all financial dealings with an SDN are prohibited and no exception is made for "personal sphere" transactions of an SDN. Docket Entry No. 23, Tab A, pp. 63-65; *citing* 31 C.F.R. §§ 550.209. OFAC's position, consistently maintained, is that because Paradissiotis is considered to be an agent of entities controlled by the Government of Libya, all financial dealings with him are deemed to be dealings with the Government of Libya. Paradissiotis' lawyers needed a license to receive payment from Paradissiotis because any United States firm that receives funds from Paradissiotis is deemed to be dealing in property in which the Government of Libya has an interest within the meaning of the LSRs. (Docket Entry No. 23, Tab A, pp. 63-64). OFAC also stated that "[b]ecause [Paradissiotis] has been designated an SDN, all property of Mr. Paradissiotis that is in the United States or in the possession or control of U.S. persons is blocked property, irrespective of the date on which he acquired that property." *Id.*; *citing* Executive Order No. 12,544, 57 Fed. Reg. 1235 (Jan. 10, 1986); 31 C.F.R. § 550.209.

On June 11, 1993, Paradissiotis applied for a license to sell the stock he owned in Coastal Corporation, exercise his options in Coastal stock, and receive the proceeds "free and clear of all restrictions on the use of the money."[5]

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5. Paradissiotis was also the president and director of Holborn Oil Trading Limited ("HOTL"), a wholly-owned subsidiary of (Cont'd)

(Docket Entry No. 23, Tab A, p. 62). Paradissiotis argued that OFAC must issue him a license because he had received

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Coastal Corporation ("Coastal"). Before the 1986 executive orders were issued and the LSRs promulgated, Coastal awarded Paradissiotis an option in 2,250 Coastal common stock, "in recognition of his exceptional performance, . . . a commitment made to many employees for their contribution." (Docket Entry No. 23, Tab A, p. 23).

While Paradissiotis was on HOTL's board of directors, HOTL was involved in negotiating an agreement between another wholly-owned Coastal subsidiary, Holborn International, Ltd. ("HIL") and a company wholly owned by the Government of Libya, National Oil Corporation ("NOC"). That agreement resulted in Libya acquiring majority ownership of a German oil refinery. HICL acquired the shares of the Holborn Europa Raffineria GmbH (HER) in 1986. In September 1987, HER purchased the German refinery. Paradissiotis was a comanaging director of HER from April 1987 to June 1988. During that period, the Government of Libya acquired a minority ownership interest in HICL, and the Holborn refinery, in exchange for an agreement to supply the crude oil required by the refinery. The Government of Libya had an option to increase its holdings over time. By January 1991, Oilinvest, B.V., which was wholly owned by a Libyan holding company, owned 66 percent of HICL. The remaining 33.33 percent was owned by the Coastal subsidiary, HOTL. HICL owned HEMCL, which was responsible for sales and marketing of the oil from the German oil refinery in which the Government of Libya had a controlling interest. As of April 1991, three of the five directors for HICL and HEMCL were Libyans who simultaneously served as general managers of Libya's state-owned petroleum company and holder of significant amounts of Libya's offshore banking interests. Paradissiotis served as a director of the Coastal subsidiary, HOTL, that owned the oil refinery with the Government of Libya, and as the president and a director of the subsidiaries controlled by the Government of Libya, HICL and HEMCL.

the Coastal stock options before the 1986 sanctions issued. (*Id.*). On July 14, 1993, OFAC denied Paradissiotis' license application on the ground that Paradissiotis was an SDN and his property was properly blocked under 31 C.F.R. § 550.209. (Docket Entry No. 23, Tab A, p. 61).

On October 13, 1993, Paradissiotis advised OFAC that Oilinvest, B.V. had transferred 55 percent of its outstanding shares to "foreign persons which are not owned or controlled by the [Government of Libya], . . . eliminat[ing] any Libyan control by the [Government of Libya] in HICL and [leaving] an effective interest in HICL of 30 percent to the [Government of Libya]." (Docket Entry No. 23, Tab A, p. 53). Paradissiotis argued that because of the change in stock ownership in Oilinvest, B.V., he should be removed from the list of SDNs of Libya. (*Id.*).

OFAC investigated the change in stock ownership of Oilinvest, B.V. OFAC concluded that the change was a response to, and an attempt to avoid, United Nations sanctions freezing Libyan assets, but did not in fact remove Libyan control over Oilinvest, B.V. OFAC found that none of the new shareholders held more than seven percent of Oilinvest, B.V. stock, while the Government of Libya continued to hold 45 percent of the shares. The shareholders who cumulatively acquired 55 percent of Oilinvest, B.V. had strong ties to Libya. (*Id.*; *see also* Docket Entry No. 23, Tab A, pp. 9-10). OFAC "declined to lift the designation of Mr. Paradissiotis, who remain[ed] president and on the board of directors of [HICL and HEMCL, wholly owned by Oilinvest], as an SDN." (Docket Entry No. 22, Tab C, Declaration of R. Richard Newcomb, OFAC Director, ¶ 21).

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On May 22, 1995, Paradissiotis applied for licenses for "the sale of securities" and "for vacation travel in the United States." (Docket Entry No. 23, Tab A, p. 24). Paradissiotis "requested a license to effectuate the sale of 500 shares of Class A Common Stock in the Coastal Corporation, and the exercise of options and subsequent sale of 2,250 shares of common stock in the Coastal Corporation." (Docket Entry No. 23, Tab A, p. 24). Paradissiotis argued again that financial transactions within a "personal sphere" should be exempt from the LSRs because "personal sphere" transactions are not conducted "on behalf of" the Government of Libya. (*Id.*). Paradissiotis also argued that he was "an appointee representative [in HICL and HEMCL] of a minority shareholder [HOTL] to protect its [HOTL's] interest against the majority [Government of Libya] ownership"; and that he worked "exclusively for the purpose of protecting the financial interest of HOTL, which indirectly protects U.S. interests, in a company now controlled by the [Government of Libya]." (Docket Entry No. 23, Tab A, pp. 25-26).

On September 1, 1995, OFAC denied Paradissiotis' application, stating that Paradissiotis had failed to "provide a basis for issuing a license for travel to the United States or for the sale of securities or other assets under U.S. jurisdiction," and did not "present . . . a reason to consider [Paradissiotis'] removal from the list of [SDNs] of Libya since there is neither a claim nor proof that the relationship between [Paradissiotis] and Libyan entities has been severed." (Docket Entry No. 23, Tab A, p. 20). OFAC requested from Paradissiotis information on "the details of the proposed sale of Coastal common stock . . . [and] the proposed exercise of stock options." (*Id.*).

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On September 15, 1995, Paradissiotis again requested administrative action to remove him from the SDN list. (Docket Entry No. 23, Tab A, p. 13). On September 29, 1995, OFAC denied Paradissiotis' license application and his request to have his name removed from the list of Libyan SDNs. OFAC "determined that changes which the [Government of Libya] made in the shareholding structure of Oilinvest shortly before November 11, 1993, when the United Nations Security Council adopted Resolution No. 883 calling upon member states to freeze Libyan assets, did not in any way dissipate [Libyan] control of Oilinvest. . . . [OFAC] therefore find[s] unpersuasive [Paradissiotis'] assertion . . . that there is 'no relationship between Mr. Paradissiotis and any Libyan entities." (Docket Entry No. 23, Tab A, pp. 9-10).

On July 17, 1996, Paradissiotis sued Robert E. Rubin ("Rubin"), as Secretary of the United States Department of the Treasury, and R. Richard Newcomb ("Newcomb"), as Director of OFAC, challenging: 1) OFAC's initial designation of him as an SDN; 2) OFAC's subsequent refusal to grant him a license to travel to the United States to exercise stock options; and 3) OFAC's refusal to remove his name from the list of SDNs.

On October 30, 1996, Paradissiotis requested a license permitting him to sell his Coastal stock and exercise his Coastal stock options. On December 27, 1996, OFAC denied Paradissiotis' request on the same ground it had asserted in denying his previous license requests.

On December 6, 1996, defendants moved for summary judgment. (Docket Entry No. 21). On March 3, 1997,

Paradissiotis filed an emergency application for a preliminary injunction. (Docket Entry No. 40). On March 17, 1997, this court denied Paradissiotis' preliminary injunction motion, denied Paradissiotis' motion for discovery, and granted defendants' summary judgment motion, on the grounds that OFAC's actions in interpreting and applying the LSRs were not arbitrary and capricious; did not violate the bill of attainder or *ex post facto* provisions of the Constitution; and did not violate Paradissiotis' Fifth or Sixth Amendment rights under the Constitution. (Docket Entry No. 49).

Paradissiotis has filed a motion to vacate this court's March 17 memorandum opinion or, in the alternative, for reconsideration. (Docket Entry No. 53). Paradissiotis has also filed a motion for leave to file a second amended complaint challenging OFAC's December 27, 1996 denial of his license requests as arbitrary and capricious and making a Fifth Amendment taking claim and a *Bivens*[6] claim. (Docket Entry No. 55).

II. The Motion for Reconsideration

Paradissiotis argues that he "was not aware that the Court was considering Federal Defendants Motion for Summary Judgment on March 17, when Plaintiff had submitted substantial legal and factual issues in dispute and evidence of imminent harm to Plaintiff upon the expiration of the options on March 19, 1997." (Docket Entry No. 53,

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6. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 90 S. Ct. 1999 (1971).

pp. 15-16). Defendants filed their motion for summary judgment on December 6, 1996. (Docket Entry No. 22). This court granted Paradissiotis an extension until February 11, 1997 to respond to defendants' motion. (Docket Entry No. 30). Paradissiotis filed a lengthy response to defendants' motion. (Docket Entry Nos. 33-34). During a March 4, 1997 telephone hearing, Paradissiotis did not tell the court that he intended to file additional pleadings, briefs, or submissions on the pending summary judgment motion. Defendants' motion for summary judgment was properly before this court for determination on March 17, 1997.

A. OFAC's Interpretation and Application of the LSRs

Paradissiotis argues that this court adopted the wrong legal standard in reviewing OFAC's interpretation and application of the LSRs. "The [memorandum and opinion], without review of any evidence of how OFAC applies or should apply the LSR, identifies as meritless Plaintiff's claim that denial of a license to unblock his personal assets is arbitrary. . . . Although OFAC's interpretation is entitled to deference, this does not mean the court can simply refuse to engage in a meaningful analysis of the statute. . . . The first step is not to grant blind deference to OFAC's interpretation, but instead to examine the 'plain language' of the LSR in order to determine if OFAC's interpretation was correct. . . . [T]he court has mistakenly treated the limited deference owed to OFAC's interpretation like a blindfold that keeps the court from engaging in a plain language reading of the LSR." (Docket Entry No. 53, pp. 10, 17-18, 22-23).

The issue, phrased more calmly than Paradissiotis states, is whether the agency's interpretation is indeed consistent with the plain language of the regulations and executive orders. In its March 17, 1997 memorandum and opinion, this court applied the standard of review set out by the Supreme Court,[7] examined in detail the "plain language" of the LSRs, specifically sections 550.304(c) and 550.209, and found "OFAC's interpretation of the LSRs to be consistent with and supported by the language of the regulations and the executive orders." (Docket Entry No. 49, pp. 17-26). In his motion for reconsideration, Paradissiotis makes the same argument he made in his original pleadings and motions, that because of the phrase "to the extent" in section 550.304(c), when a transaction is within a "personal sphere" not conducted on behalf of the Government of Libya, the transaction is not prohibited by the LSRs. (Docket Entry No. 53, pp. 16-25). This court addressed this argument at length in its March 17 memorandum and opinion. (*Id.*, pp. 17-20). Paradissiotis has not made any argument he did not raise in his earlier briefs. He identifies no basis for reconsideration of this court's March 17 memorandum and opinion as to OFAC's interpretation and application of the LSRs.

This court DENIES Paradissiotis' motion to vacate or reconsider the dismissal of Paradissiotis' claim that OFAC's interpretation of the LSRs was arbitrary and capricious and/or an abuse of discretion.

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7. *Chevron U.S.A. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984); *Citizens to Preserve Overton Park v. Volpe*, 91 S. Ct. 814 (1971); *see also Consarc Corp. v. United States*, 71 F.3d 909 (D.C. Cir. 1995).

Appendix B

B. The Bill of Attainder Claim

Paradissiotis argues that this court "is wrong that Plaintiff did not raise the fact issue" and that this court erred in "adopt[ing] the Federal Defendants' position that the SDN List and OFAC's application are interpretive and are not 'law making in the traditional sense.' " (Docket Entry No. 53, pp. 14 and 29). In its March 17 memorandum, this court noted that the "Supreme Court has not resolved whether an executive administrative agency's actions may be challenged as a bill of attainder[;] . . . several courts have suggested that the constitutional prohibition applies only to legislative acts." (Docket Entry No. 49, p. 27). However, this court did not simply accept OFAC's argument that the SDN could not be challenged as a bill of attainder because it was not a legislative act. Rather, this court "assume[d], without deciding, for the purpose of this motion, that Paradissiotis may challenge OFAC's publication of the list of SDNs that included Paradissiotis' name as a bill of attainder." (*Id.*, p. 29).

Paradissiotis argues that OFAC's actions constitute "punishment" within the meaning of the bill of attainder prohibition. Paradissiotis made the same argument in his response to defendants' summary judgment motion. (Docket Entry No. 33). This court addressed that "punishment" argument in its March 17 memorandum, examined the same cases Paradissiotis cites in his brief in support of his motion for reconsideration, and found that Paradissiotis did not raise a fact issue that OFAC's actions constituted legislative punishment. The court also found that the administrative record did not evidence an intent to punish and that the SDN

lists served a legitimate governmental purpose. (Docket Entry No. 49, pp. 30-32). Paradissiotis offers no new basis to require a different result.

This court DENIES Paradissiotis' motion for this court to vacate or reconsider its dismissal of his bill of attainder claim.

C. The *Ex Post Facto* Law Claim

Paradissiotis argues that this court relied on an improperly narrow definition of "penal" in its discussion of his *ex post facto* law claim. He also argues that this court failed to consider that "Paradissiotis' designation, unknowingly placed upon him, did not accord him any opportunity to change his conduct to avoid the ensuing punishment[;] . . . a change in the law has resulted in harsh and oppressive punishment upon Mr. Paradissiotis, a result which is by definition penal in nature." (Docket Entry No. 53, pp. 33-34). Paradissiotis' arguments do not take into account *Korte v. OPM*, in which the court noted that "from 'earliest times,' the Supreme Court has construed the *ex post facto* provision to apply only to criminal laws." 797 F.2d 967, 972 (Fed. Cir. 1986); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (the *ex post facto* law provision prohibits "penal legislation which imposes or increases criminal punishment"). Even if this court adopted a broad definition of "penal," Paradissiotis did not raise a fact issue that OFAC's actions met this definition. (Docket Entry No. 49, pp. 32-33).

This court DENIES Paradissiotis' motion for this court to vacate or reconsider its dismissal of his *ex post facto* law claim.

Appendix B

D. The Fifth Amendment Claim

Paradissiotis argues that this court erred because he was deprived of his property without procedural due process. (Docket Entry No. 53, pp. 26-28). As the court noted in its March 17, 1997 memorandum and opinion, the constitutionality of OFAC's blocking orders has withstood Fifth Amendment challenges, both under the taking "without just compensation" clause and under the "without due process of law" clause. (Docket Entry No. 49, pp. 33-36).

Courts have upheld executive actions similar to the Libyan sanctions against arguments similar to those raised by Paradissiotis. In *Knox v. Lee*, the Supreme Court observed that:

> a new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . . [w]as it ever imagined this was *taking private property without just compensation or without due process of law*?

79 U.S. 457, 551 (1870) (Emphasis added). Over a century later, a district court broadly stated that:

> temporary freezing of foreign-owned assets in this country falls within the constitutional limits

> of the Fifth Amendment and has been used repeatedly as a means of implementing policy. . . . The President has wide latitude to chart and determine foreign policy and the tools at his disposal, including blocking of assets, should be as unencumbered as possible within the limits of the Constitution.

IPT Company Inc., 1994 WL 613371 (S.D.N.Y. 1994); *see also Usery v. Turner Elkhorn Mining Co.*, 96 S. Ct. 2882, 2892 (1976) ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations").

Assuming, without deciding, that Paradissiotis suffered a deprivation, to which due process requirements applied, the court must determine how much process was due Paradissiotis. *See generally FDIC v. Mallen*, 108 S. Ct. 1780, 1787 (1988). In *IPT Company*, the court found that the freezing of "all property and interests in property within the United States of all entities owned and controlled by the Federal Republic of Yugoslavia," which included blocking all assets of the plaintiff with "no advance notice that [plaintiff's] business was going to be shut down," was not a deprivation of property "without due process of law." *Id.* The court noted that, in general, due process "requires notice and an opportunity to be heard before property can be permanently seized by the Government." *Id.*; *citing United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498 (1993). The court then noted that "in the case of a temporary deprivation of property, predeprivation hearings are generally not required." *IPT Company*, 1994

WL 613371 at *6; *citing Mathews v. Eldridge*, 424 U.S. 319, 333-334 (1976); *cf. Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 101 S. Ct. 2352, 2374 (1981) ("discretion of any official action may be abused. Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination");. The court concluded that the blocking orders at issue were "a temporary deprivation of property and as such defendants are not required to grant predeprivation hearings before the enforcement of a temporary blocking order. Therefore, the blocking without a predeprivation hearing is not a violation of due process." *IPT Company*, 1994 WL 613371 at *6.

The lack of a predeprivation hearing is also justified by the "emergency" nature of the LSRs and the need for "prompt action." *See Parratt v. Taylor*, 101 S. Ct. 1908, 1914-15 (1981) (discussing a line of Supreme Court cases holding that the need for quick government action justified the lack of pre-deprivation hearings), *overruled in part on other grounds by Daniels v. Williams*, 106 S. Ct. 662 (1986) (finding no deprivation and that "due process is not implicated by a negligent act of an official causing unintended loss or injury to life, liberty or property"); *Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1493 (1985) (the lack of predeprivation hearings is justified "in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"). In Executive Orders No. 12,543 and 12,544, the President declared a national

emergency under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, finding that "the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States."

Paradissiotis argues that his due process rights were violated because he was denied a postdeprivation hearing. However, the statute and regulations allowed Paradissiotis to request general or specific licenses from OFAC; submit evidence; seek to reopen the license application if OFAC denied the request; request an explanation for any license denial; seek a personal interview with OFAC; and challenge OFAC's denial of a license in court as arbitrary and capricious. The Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, also offers procedural safeguards. Paradissiotis' argument is unpersuasive. *See Franklin Savings Association v. Office of Thrift Supervision*, 35 F.3d 1466, 1472 (10th Cir. 1994) ("due process is satisfied by the arbitrary and capricious standard of review of the agency's initial determination"); *CEDC Federal Credit Union v. National Credit Union Administration*, 1996 WL 547505 (2d Cir. 1996) (the "conservatorship statute safeguards the credit union's due process interests by providing postdeprivation review of administrative decisions by the district court"), *cert. denied*, 117 S. Ct. 1426 (1997); *Phillips v. Commissioner*, 51 S. Ct. 608, 611 (1931) ("where only property rights are involved, mere postponement of the judicial enquiry is not denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate").

Paradissiotis asserts that "the alien is entitled to due process where the agency action is outside the authority expressly conferred on the agency by law." (Docket Entry No. 53, p. 28). By this argument in support of due process claim, Paradissiotis reurges his argument that OFAC acted arbitrarily and capriciously in designating him as an SDN of the Government of Libya and in denying his license requests. This court has already determined that OFAC did not act arbitrarily, capriciously, or outside its authority, in designating and interpreting and applying the LSRs and in designating Paradissiotis as an SDN of the Government of Libya. Paradissiotis was afforded administrative and judicial review of OFAC's actions. Defendants did not violate Paradissiotis' procedural due process rights.

This court DENIES Paradissiotis' motion to vacate or reconsider the dismissal of his procedural due process claim.

E. The Sixth Amendment Claim

Paradissiotis argues that he "simply seeks the right to use U.S. legal counsel with respect to any transaction to assure compliance with all U.S. laws. . . . OFAC cannot be permitted to promulgate very complex regulations which impose sever[e] criminal penalties while simultaneously imposing a licensing restriction to effectively deny access to counsel to enable the SDN to avoid violation of those same regulations." Docket Entry No. 53, pp. 34-37; *citing American Airways Charters Inc. v. Reagan*, 746 F.2d 865 (D.C.Cir. 1984). Paradissiotis made this same argument in his response to defendants' summary judgment motion, in

which he also broadly argued that OFAC had denied him "access" to legal counsel.[8]

In *American Airways*, the court limited its inquiry to "the bare formation of an attorney-client relationship," and suggested that the purpose of the sanctions could have been met had the government allowed the plaintiff "to retain — although not to pay — counsel without government license." 746 F.2d at 866-72. In this case, unlike *American Airways*, the issue is not the bare formation of an attorney-client relationship, but the compensation of counsel by an SDN.[9]

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8. Defendants argue that "Plaintiff has yet to establish that, as a non-resident alien who is not within the physical jurisdiction of the United States, he is entitled to the protection of the constitutional provisions he raises. Several courts, including the Supreme Court, have declined to apply extraterritorially several provisions of the Constitution." Docket Entry No. 62, p. 8; *citing United States v. Verdugo-Urquidez* 494 U.S. 259, 274-75 (1990) (rejecting plaintiff's claim that Fourth Amendment protections extent to a non-resident alien who has subjected to a search conducted in Mexico by U.S. agents); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (rejecting claim that aliens outside the sovereign territory of the United States are entitled to Fifth Amendment rights). This court did not reach this issue in its March 17 memorandum.

9. OFAC requires a license for a United States person to receive compensation from a Libyan SDN for legal services provided. 31 C.F.R. §§ 550.517(b) and 550.209. OFAC does not require a license for a United States person to provide the following uncompensated legal services to Libyan SDNs: "i) legal advice and counseling to the Government of Libya . . . on the requirements

(Cont'd)

The *American Airways* court did not reach this issue, "caution[ing] that nothing in [its] disposition is properly read as authorizing payment to counsel without the approval of OFAC[;] . . . no fee can be paid to counsel absent a separate, and express, authorization from OFAC." 746 F.2d at 875,874. This court's holding, that OFAC did not violate Paradissiotis' Sixth Amendment rights by requiring him to obtain a license to compensate his attorneys, does not run counter to the holding in *American Airways*.

Paradissiotis argues that he faces imminent prosecution because OFAC's regulations are complex and impose severe criminal penalties for noncompliance. As this court noted in its March 17, 1997 memorandum and opinion, Paradissiotis, who was granted a license to compensate counsel, has not shown that he faces imminent prosecution. *See Arrington v. County of Dallas*, 970 F.2d 1441, 1445 (5th Cir. 1992); *see also Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987), *aff'd*, 851 F.2d 1500 (D.C.Cir. 1988).

(Cont'd)

of and compliance with the laws of any jurisdiction within the United States . . .; 2) representation of the Government of Libya . . . when named as a defendant in or otherwise made a party to domestic U.S. legal, arbitration, or administrative proceedings; 3) initiation of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. Jurisdiction of the Government of Libya that were in existence prior to January 8, 1986; 4) representation of the Government of Libya . . . before any federal agency with respect to imposition, administration, or enforcement of U.S. sanctions against Libya; and 5) provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense." 31 C.F.R. § 550.217.

He cannot satisfy the threshold injury requirement. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

This court DENIES Paradissiotis' motion to reconsider or vacate the dismissal of his Sixth Amendment right to counsel claim.

F. The Discovery Request

Paradissiotis argues that this court should reconsider its finding that he did not make a strong showing of bad faith on the part of OFAC. (Docket Entry No. 53, Paradissiotis also argues that, if he were allowed to conduct discovery, he could raise a fact issue as to his claims against defendants. For example, Paradissiotis asserts that he could raise a fact issue that "the SDN list effects a permanent change in status of individuals"; that "neither the [Government of Libya] nor any national thereof has an interest in his property rights"; that "OFAC violated its own licensing procedures with respect to Dr. Riecke"; and that "Plaintiff can and will present evidence under Cyprus law, the applicable law, to contradict the facts alleged by Federal Defendants in its brief that Plaintiff has a superior fiduciary duty to the [Government of Libya] by the mere fact of his capacity as an officer of Holborn Investment Co. Ltd." (Docket Entry No. 53, pp. 10-15).

As this court stated in its March 17, 1997 memorandum and opinion, discovery and supplementation of the administrative record is not necessary in this case. (Docket Entry No. 49, pp. 40-43). The record is not incomplete or inadequate to explain the agency action, so as effectively

to frustrate judicial review. Paradissiotis did not, and has not now, made a sufficient showing that the agency engaged in improper behavior or acted in bad faith to make discovery necessary or appropriate to resolve the legal issues presented. Even if OFAC did not apply the LSRs the same way to Paradissiotis as it did to other individuals, "the case-by-case nature of the determination, the legal and factual basis for OFAC's application of the LSRs to Paradissiotis, and the deferential standard of review preclude this argument as a basis for discovery." (*Id.*, p. 40 n.11). This court has found that, in designating Paradissiotis an SDN of Libya and denying his license requests, OFAC acted within its authority, adequately considered the relevant factors, and provided a reasoned basis for its decision. (*Id.*, p. 43).

This court again DENIES Paradissiotis leave to conduct discovery.

III. The Motion for Leave to File a Second Amended Complaint

Paradissiotis seeks leave to amend his complaint to assert: (i) that OFAC's December 27, 1996 denial of his license requests was arbitrary and capricious; "that his property (stock options) has been taken without just compensation in violation of the Fifth Amendment to the Constitution; and (iii) a *Bivens* claim." (Docket Entry No. 55, ¶ 2).

After responsive pleadings have been filed, a party seeking to amend its pleadings must seek "leave of court"

or the "written consent of the adverse party." FED.R.CIV.P. 15(a). Leave to amend is not "automatic," *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993), but is "freely given." FED.R.CIV.P. 15(a); *see Silvers v. TTC Industries, Inc.*, 484 F.2d 194, 198 (6th Cir. 1973). The Supreme Court has stated that:

> [i]n the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, the repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc. — the leave sought should, as the Rules require, be "freely given." Of course, the grant or denial or an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion inconsistent with the spirit of the Federal Rules.

Forman v. Davis, 83 S. Ct. 227, 230 (1962); *see also Whitaker v. City of Houston, Texas*, 963 F.2d 831, 836 (5th Cir. 1992). "Among the acceptable justifications for denying leave to amend are undue delay, bad faith, . . . and the futility of the amendment." *Jamieson by and through Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985), *citing Union Planters National Leasing, Inc. v. Woods*, 687 F.2d 117, 121 (5th Cir. 1982). In order to deny leave on the basis that

the amendment would be futile, the court must find "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Jamieson*, 772 F.2d at 1209; *citing Conley v. Gibson*, 355 U.S. 232, 236 (1974).

Paradissiotis seeks to amend his complaint to assert a taking claim. However, as Paradissiotis concedes, in its March 17, 1997 memorandum and opinion, this court found that the undisputed facts do not as a matter of law give rise to a Fifth Amendment violation in this case. To amend the complaint to assert a taking claim would be futile. *See Chang v. United States*, 859 F.2d 893, 895 (Fed. Cir. 1988).

Paradissiotis also seeks to add a *Bivens* claim against OFAC and Treasury Department federal officials. *See Bivens*, 90 S. Ct. at 2005. This court has found that OFAC did not violate Paradissiotis' constitutional rights. To allow Paradissiotis to assert a *Bivens* claim would be futile.

Paradissiotis seeks to amend his complaint to add a challenge to OFAC's December 27, 1996 denial of his license requests. Paradissiotis presented his license requests and OFAC's December 27, 1996 denial as exhibits in his response to defendants' motion for summary judgment. This court reviewed the record and addressed in detail Paradissiotis' challenge to the OFAC denials in its March 17, 1997 memorandum and opinion. Paradissiotis does not assert new grounds under which he seeks to challenge the most recent denials of his license requests. To allow Paradissiotis to amend his complaint every time he makes a license request that OFAC denies would not serve the

interests of justice, would burden judicial resources, and prolong this litigation unnecessarily.

This court DENIES Paradissiotis' motion for leave to file an amended complaint.

IV. Conclusion

This court DENIES Paradissiotis' motions and ORDERS the parties to submit a proposed order, within 10 days from the date this memorandum and order is entered, reflecting this court's disposition of the claims raised against defendants Rubin and Newcomb.

SIGNED on August 18, 1997, at Houston, Texas.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX C — MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AND FILED MARCH 17, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO.H-96-2314

CHRISTOFOROS PARADISSIOTIS,

Plaintiff,

VS.

ROBERT E. RUBIN, *et al.*,

Defendants.

MEMORANDUM AND OPINION

Pending before this court are a motion to dismiss or, in the alternative, for summary judgment, filed by defendants Robert E. Rubin ("Rubin), Secretary of the United States Department of Treasury, and R. Richard Newcomb ("Newcomb"), Director of the Office of Foreign Assets Control ("OFAC"), (Docket Entry No. 21); a motion to allow discovery filed by plaintiff Christoforos Paradissiotis ("Paradissiotis"), (Docket Entry No. 32); and an application for a preliminary injunction filed by Paradissiotis (Docket Entry No. 40). After a careful review of the pleadings, the motions, the administrative record, the parties' submissions,

and the applicable law, this court DENIES plaintiff's motion to conduct discovery; GRANTS defendants' motion for summary judgment; and DENIES plaintiff's motion for a preliminary injunction, for the reasons stated below.

I. The Factual and Procedural Background

The underlying facts concerning the executive orders and regulations made the basis of this lawsuit are largely undisputed. Docket Entry No. 22, p. 10; *see Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988); *see also Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987), *aff'd*, 851 F.2d 1500 (D.C.Cir. 1988, table disposition).

A. The Executive Orders and Administrative Actions

On January 7 and 8, 1986, President Reagan declared a national emergency under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §. 1701 *et seq.*, finding that "the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States." Executive Order No. 12,543. The President issued two executive orders, one prohibiting trade with the Government of Libya and its instrumentalities, Executive Order No. 12,543, 51 Fed. Reg. 875 (1986), and the other freezing all property and interests in the property of the Government of Libya, its agencies, instrumentalities, and controlled entities that are in the United States or in the possession or control of United States persons, Executive Order No. 12,544, 51

Fed. Reg. 1235 (1986).[1] (Docket No. 23, Tab A, Exs. 1 and 2).

The executive orders authorized the Secretary of the Treasury, in consultation with the Secretary of State, "to take necessary action [and] . . . employ all powers granted [the President] by [IEEPA] to carry out the provision of th[e] Order." Executive Order Nos. 12,543 and 12,544. The Secretary of the Treasury delegated his authority and duties relating to the Libyan economic sanctions to the Director of the Office of Foreign Asset Control ("OFAC"). *Cf. Regan v. Wald*, 104 S. Ct. 3026, 3030 n.2 (1984).

On January 16, 1986, the Treasury Department, through OFAC, issued the Libyan Sanctions Regulations ("LSRs"). These regulations implemented the executive orders by regulating commercial and financial transactions with the "Government of Libya," a term defined by the regulations to include entities and persons owned or controlled by, or acting on behalf of, Libya. 31 C.F.R. Part 550. The regulations block transfers of property in which the

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1. The International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, was enacted in 1977 as part of a comprehensive revision of the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 *et seq.*, to clarify "the President's authority to regulate international economic transactions during national emergencies" in peacetime. S. Rep. No. 466, 95th Cong., 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541. Under the IEEPA, the President is granted wide latitude "to deal with an unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States, if [the President] declares a national emergency with respect to that threat." 50 U.S.C. § 1701(a).

"Government of Libya" has an interest, if the interest is in property in the United States or in the possession or control of United States persons. 31 C.F.R. § 550.209.[2]

The LSRs define the "Government of Libya" to include:

> (a) The state and the Government of Libya, as well as any political subdivision, agency, or

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2. 31 C.F.R. § 550.209, "prohibited transactions involving property in which the Government of Libya has an interest, transactions with respect to securities," provides that:

> (a) Except as authorized by regulations, rulings, instructions, licenses, or otherwise, no property or interests in property of the Government of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.
>
> (b) Unless authorized by a license expressly referring to this section, the acquisition, transfer (including the transfer on the books of any issuer or agent thereof), disposition, transportation, importation, exportation, or withdrawal of, or the endorsement or guaranty of signatures on or otherwise dealing in any security (or evidence thereof) registered or inscribed in the name of the Government of Libya is prohibited irrespective of the fact that at any time (either prior to, on, or subsequent to 4:10 p.m. e.s.t., January 8, 1986) the registered or inscribed owner thereof may have, or appears to have, assigned, transferred or otherwise disposed of any such security.

> instrumentality thereof, including the Central Bank of Libya;
>
> (b) Any partnership, association, corporation, or other organization owned or controlled directly or indirectly by the foregoing;
>
> (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing;
>
> (d) Any other person or organization determined by the Secretary of the Treasury to be included within this section.

31 C.F.R. § 550.304.

OFAC labels as a Specially Designated National ("SDN") any individual who "is, or has been . . . acting . . . directly or indirectly on behalf of . . . [an organization] owned or controlled directly or indirectly by" the Government of Libya. SDNs of Libya are subject to the same economic prohibitions applicable to the Government of Libya itself.

"Transactions subject to the prohibitions contained [in the LSRs] which are not authorized by general license may be effected only under specific license." 31 C.F.R. § 550.801(b)(1). OFAC determines whether to grant a

specific license on a case-by-case basis and may revoke a specific license that was previously granted. 31 C.F.R. § 550.803. If an SDN or other applicant is denied a specific license, the applicant may seek to reopen the application, request an explanation for the license denial, or seek a personal interview with OFAC.

B. Christoforos Paradissiotis

Paradissiotis, a resident and national of Cyprus, is the president and a member of the board of directors of Holborn Investment Company Limited ("HICL") and its wholly-owned subsidiary, Holborn European Marketing Company Limited ("HEMCL"). HICL and HEMCL are subsidiaries of Oilinvest (Netherlands) B.V. ("Oilinvest B.V."). Oilinvest, B.V. was wholly owned by Oilinvest International, N.V., ("Oilinvest International"), a Libyan state-controlled holding company that is the principal investment arm of the Government of Libya. (Docket Entry No. 23, Tab A, pp. 77, 80, 83, 89, 112, 114-17, 137, 352-53). Oilinvest International has extensive holdings in Europe and is primarily involved in expanding the presence of the Government of Libya in the European downstream petrochemical market. (Docket Entry No. 23, Tab A, pp. 77, 80-83, 89-99, 112, 114-17, 137, 352-53).

Paradissiotis is also the president and director of Holborn Oil Trading Limited ("HOTL"), a wholly-owned subsidiary of Coastal Corporation ("Coastal"). Before the 1986 executive orders were issued and the LSRs promulgated, Coastal awarded Paradissiotis an option in 2,250 Coastal common stocks, "in recognition of his

exceptional performance, . . . a commitment made to many employees for their contribution." (Docket Entry No. 23, Tab A, p. 23). The options will expire worthless if not exercised on or before March 19, 1997.

While Paradissiotis was on HOTL's board of directors, HOTL was involved in negotiating an agreement between another wholly-owned Coastal subsidiary, Holborn International, Ltd. ("HIL") and a company wholly owned by the Government of Libya, National Oil Corporation ("NOC"). That agreement resulted in Libya acquiring majority ownership of a German oil refinery. HICL acquired the shares of the Holborn Europa Raffineria GmbH (HER) in 1986. In September 1987, HER purchased the German refinery. Paradissiotis was a comanaging director of HER from April 1987 to June 1988. During that period, the Government of Libya acquired a minority ownership interest in HICL, and the Holborn refinery, in exchange for an agreement to supply the crude oil required by the refinery. The Government of Libya had an option to increase its holdings over time. By January 1991, Oilinvest, B.V., the company wholly owned by a Libyan holding company, owned 66 percent of HICL. The remaining 33.33 percent was owned by the Coastal subsidiary, HOTL. HICL owned HEMCL, which was responsible for sales and marketing of the oil from the German oil refinery in which the Government of Libya had a controlling interest. As of April 1991, three of the five directors for HICL and HEMCL were Libyans who simultaneously served as general managers of Libya's state owned petroleum company and holder of significant amounts of Libya's offshore banking interests. Paradissiotis served as a director of the Coastal subsidiary,

HOTL, that owned the oil refinery with the Government of Libya, and as the president and a director of the subsidiaries controlled by the Government of Libya, HICL and HEMCL.

C. The SDN List and this Lawsuit

On August 5, 1991, OFAC designated Paradissiotis an SDN who "is, or has been . . . acting . . . directly or indirectly on behalf of . . . [an organization] owned or controlled directly or indirectly by" the Government of Libya. 56 Fed. Reg. 37,156 (1991). The designation made Paradissiotis subject to the same economic prohibitions applicable to the Government of Libya. OFAC designated Paradissiotis an SDN because of his position as president and board member of two SDN-designated entities, HICL and HEMCL, subsidiaries of Oilinvest, B.V. (Docket Entry No. 23, Tab A, pp. 71-72, 77-79, 120, 221).

In June 1991, OFAC had designated HICL, HEMCL, HER, and their corporate officers and directors as SDNs of Libya, based on a determination that they were owned and/or controlled by the Government of Libya and its holding companies. (Docket Entry No. 23, Tab A, pp. 120-124). OFAC "examin[ed] such factors as management contracts, bylaws, voting agreements, and whether the remainder of an entity's stock is so widely dispersed that equity ownership of less than 50 percent might still constitute effective control." (Docket Entry No. 23, Tab A, p. 71). Oilinvest B.V. and Oilinvest International were also named SDNs of Libya. (Docket Entry No. 23, Tab A, pp. 120-271).

On January 4, 1993, Paradissiotis notified OFAC that he had retained a United States law firm for "legal advice

and counsel concerning the [LSRs] and ancillary matters" and requested confirmation from OFAC that he did not need a license because he was seeking legal advice as an individual and not as a representative of any SDN-designated organization. (Docket Entry No. 23, Tab A, pp. 69-70). On February 2, 1993, OFAC granted Paradissiotis a license to compensate his counsel. (Docket Entry No. 23, Tab A, pp. 68A-68C, License No. 772).

On May 7, 1993, Paradissiotis asked for "clarification or license for individual SDN [Paradissiotis] to conduct personal affairs," arguing that his "designation as an SDN should not cause the application of [the LSRs] to restrict his personal affairs and private business affairs to the extent he is not acting on behalf of . . . any company owned or controlled by the [Government of Libya." (Docket Entry No. 23, Tab A, p. 66). On May 17, 1993, OFAC responded that all financial dealings with an SDN are prohibited and no exception is made for "personal sphere" transactions of an SDN. Docket Entry No. 23, Tab A, pp. 63-65; *citing* 31 C.F.R. §§ 550.209. OFAC's position, consistently maintained, is that because Paradissiotis is considered to be an agent of entities controlled by the Government of Libya, all financial dealings with him are deemed to be dealings with the Government of Libya. Paradissiotis' counsel needed a license to receive payment from Paradissiotis because any United States firm that receives funds from Paradissiotis is dealing in property in which the Government of Libya has an interest, within the meaning of the LSRs. (Docket Entry No. 23, Tab A, pp. 63-64). OFAC also stated that "[b]ecause [Paradissiotis] has been designated an SDN, all property of Mr. Paradissiotis that is

in the United States or in the possession or control of U.S. persons is blocked property, irrespective of the date on which he acquired that property." *Id.*; *citing* Executive Order No. 12,544, 57 Fed. Reg. 1235 (Jan. 10, 1986); 31 C.F.R. § 550.209.

On June 11, 1993, Paradissiotis applied for a license to sell his Coastal stock, exercise his Coastal stock options, and receive the proceeds "free and clear of all restrictions on the use of the money." (Docket Entry No. 23, Tab A, p. 62). Paradissiotis argued that a license should be issued because he received the stock options before the 1986 sanctions issued. (*Id.*). On July 14, 1993, OFAC denied Paradissiotis' license application on the ground that Paradissiotis was an SDN and his property was properly blocked under 31 C.F.R. § 550.209. (Docket Entry No. 23, Tab A, p. 61).

On October 13, 1993, Paradissiotis advised OFAC that Oilinvest, B.V. had transferred 55 percent of its outstanding shares to "foreign persons which are not owned or controlled by the [Government of Libya], . . . eliminat[ing] any Libyan control by the [Government of Libya] in HICL and [leaving] an effective interest in HICL of 30 percent to the [Government of Libya]." (Docket Entry No. 23, Tab A, p. 53). Paradissiotis argued that because of the change in stock ownership in Oilinvest, B.V., he should be removed from the list of SDNs of Libya. (*Id.*).

OFAC investigated the change in stock ownership of Oilinvest, B.V. OFAC concluded that the change was a response to, and an attempt to avoid, United Nations

sanctions freezing Libyan assets, but did not in fact remove Libyan control over Oilinvest, B.V. None of the new shareholders held more than seven percent of Oilinvest, B.V. stock, while the Government of Libya continued to hold 45 percent of the shares. The shareholders who cumulatively acquired 55 percent of Oilinvest, B.V. had strong ties to Libya. (*Id.*; *see also* Docket Entry No. 23, Tab A, pp. 9-10). OFAC "declined to lift the designation of Mr. Paradissiotis, who remain[ed] president and on the board of directors of [HICL and HEMCL, wholly owned by Oilinvest], as an SDN." (Docket Entry No. 22, Tab C, Declaration of Richard Newcomb, Director, Office of Foreign Assets Control, ¶ 21).

On May 22, 1995, Paradissiotis applied for licenses for "the sale of securities" and "for vacation travel in the United States." (Docket Entry No. 23, Tab A, p. 24). Paradissiotis "requested a license to effectuate the sale of 500 shares of Class A Common Stock in the Coastal Corporation, and the exercise of options and subsequent sale of 2,250 shares of common stock in the Coastal Corporation." (Docket Entry No. 23, Tab A, p. 24). Paradissiotis argued again that financial transactions within a "personal sphere" should be exempt from LSR because such transactions are not conducted "on behalf of" the Government of Libya. (*Id.*). Paradissiotis argued that he was "an appointee representative [in HICL and HEMCL] of a minority shareholder [HOTL] to protect its [HOTL's] interest against the majority [Government of Libya] ownership"; that he worked "exclusively for the purpose of protecting the financial interest of HOTL, which indirectly protects U.S. interests, in a company now controlled by the [Government of Libya]." (Docket Entry No. 23, Tab A, pp. 25-26).

Appendix C

On September 1, 1995, OFAC denied Paradissiotis' application, stating that Paradissiotis had failed to "provide a basis for issuing a license for travel to the United States or for the sale of securities or other assets under U.S. jurisdiction," and did not "present . . . a reason to consider [Paradissiotis'] removal from the list of [SDNs] of Libya since there is neither a claim nor proof that the relationship between [Paradissiotis] and Libyan entities has been severed." (Docket Entry No. 23, Tab A, p. 20). OFAC requested from Paradissiotis information on "the details of the proposed sale of Coastal common stock . . . [and] the proposed exercise of stock options." (*Id.*).

On September 15, 1995, Paradissiotis again "request[ed] administrative action to remove Mr. Paradissiotis from the SDN list. (Docket Entry No. 23, Tab A, p. 13). On September 29, 1995, OFAC denied Paradissiotis' license application and request to have his name removed from the list of Libyan SDNs. OFAC based its denial on the grounds that:

> 1) the standards for SDN designation are set forth in the LSR at § 550.304 and for blocking at § 550.209; 2) pursuant to IEEPA and the LSR, the Secretary has discretion to grant or deny licenses with respect to blocked property; 3) that all property of [Paradissiotis] that is in the United States or in the possession or control of U.S. persons is blocked property of the [Government of Libya] regardless of the date on which he acquired that property and regardless of whether the proposed transaction dealt only with his

> personal affairs; and 4) [Paradissiotis] was not removed from the SDN list or given a license in large part because he remains president and serves on the board of directors of two firms controlled by the Government of Libya (HICL and HEMCL).

(Docket Entry No. 22, p. 19; *citing* Docket Entry No. 23, pp. 9-12). OFAC explicitly stated that it had "determined that changes which the [Government of Libya] made in the shareholding structure of Oilinvest shortly before November 11, 1993, when the United Nations Security Council adopted Resolution No. 883 calling upon member states to freeze Libyan assets, did not in any way dissipate [Libyan] control of Oilinvest. Although the readjustment nominally reduced the [Government of Libya's] role to that of minority shareholder, the United States Government does not view these steps as having terminated the [Government of Libya's] effective control over Oilinvest. Indeed European individuals to whom the [Government of Libya] divested its shares subsequently were determined to be SDNs of Libya. *See* 59 Fed. Reg. 51,106 (October 7, 1994). [OFAC] notes that the change in ownership interest was made at a time when the Security Council's deliberations on further Libyan sanctions had become public. It remains the position of the United States government that Oilinvest is an entity of the [Government of Libya]. We therefore find unpersuasive [Paradissiotis'] assertion . . . that there is 'no relationship between Mr. Paradissiotis and any Libyan entities." (Docket Entry No. 23, Tab A, pp. 9-10).

On July 17, 1996, Paradissiotis sued Rubin, as Secretary of the United States Department of the Treasury, challenging

1) OFAC's initial designation of him as an SDN; 2) OFAC's subsequent refusal to grant him a license to travel to the United States to exercise stock options; and 3) OFAC's refusal to remove his name from the list of SDNs.

Defendants have moved for summary judgment dismissing Paradissiotis' claims. (Docket Entry No. 21). Paradissiotis has filed an emergency application for a preliminary injunction. (Docket Entry No. 40).

II. The Applicable Legal Standards

A. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Little*, 37 F.3d at 1075.

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Little*, 37 F.3d at 1075; *citing Celotex*, 106 S. Ct. at 2553-54.

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. at 2513. "Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little*, 37 F.3d at 1075; *citing Celotex*, 106 S. Ct. at 2552.

B. The Preliminary Injunction Standard

A party seeking a preliminary injunction must establish the following four elements:

> (1) a substantial likelihood that a plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to the defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

Rodriguez v. United States, 66 F.3d 95, 97 (5th Cir. 1995). If a moving party cannot meet any of the four prerequisite elements, a court may not grant the party preliminary relief. *Enterprise International Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985); *see also Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 809 (5th Cir. 1989).

III. The Administrative Challenge to OFAC's Actions

A. The Standard of Review

A court's review of an administrative agency decision is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 551 *et seq*. An agency decision must be sustained unless the reviewing court finds that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Milena Ship Management Co. v. Newcomb*, 995 F.2d 620, 623 (5th Cir. 1993). A court makes its determination, based "on the full administrative record that was before the [administrative officer] . . . at the time he made his decision," by reviewing whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision. *Citizens to Preserve Overton Park v. Volpe*, 91 S. Ct. 814, 823-25 (1971).

A court gives special deference to an agency's interpretation of an executive order the agency is charged with administering. *Milena Ship Management*, 995 F.2d at 623-24; *see also DeCuellar v. Brady*, 881 F.2d 1561, 1565 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 245 (1990); *cf.*

Miranda v. Secretary of the Treasury, 766 F.2d 1, 3-4 (1st Cir. 1985) (judicial review of the executive branch's conduct in foreign relations is limited). "[A]n interpretation of the [blocking regulations] by OFAC, being an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation." *Consarc Corporation v. United States*, 71 F.3d 909, 915 (D.C.Cir. 1995). A "challenge to [OFAC's] interpretation must either demonstrate that the statute clearly forbids the agency's interpretation or that the interpretation is unreasonable." *Consarc*, 71 F.3d at 914; *citing Chevron U.S.A. v. Natural Resources Defense Council*, 104 S. Ct. at 2778, 2781-83 (1984). A "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 104 S. Ct. at 2781-83, *quoted in DeCuellar*, 881 F.2d at 1565.

B. OFAC's Interpretation of the LSRs: The Property at Issue

Paradissiotis argues that OFAC erred in interpreting the LSRs: (1) to block property and prohibit transfers occurring in a "personal sphere"; and (2) to block property acquired before the 1986 sanctions took effect.

1. The Language of the LSRs

Paradissiotis argues that the "plain language of LSR § 550.304(c) . . . results in a conclusion that a proposed transaction with Plaintiff is prohibited 'to the extent' that

he is acting on behalf of the [Government of Libya]." (Docket Entry No. 33, pp. 29-34). Paradissiotis argues that because of the "to the extent" language, when a transaction is within a "personal sphere" not conducted "on behalf of the Government of Libya," the transaction is not prohibited by the LSRs. (*Id.*).

Section 550.304(c), which contains the "to the extent" language, appears in the section defining the "Government of Libya" for the purposes of the LSRs. In the definition of the "Government of Libya," section 550.304(c) includes those "persons" who OFAC has reason to believe are acting or have acted directly or indirectly on behalf of the Government of Libya or one of its organizations. The "prohibitions" section of the regulations, unlike the "definitions" section, does not contain the "to the extent" limitation. *See* 31 C.F.R. § 550.209. In the prohibitions section, the regulations state that "*no property* or interests in property of the Government of Libya that are in the United States . . . may be transferred, paid, exported, withdrawn or otherwise dealt in" without a specific license. 31 C.F.R. § 550.209(a) (emphasis added). Once a person falls within the definition of the Government of Libya, any transaction by that person is prohibited. The language of the regulations does not prohibit transactions only "to the extent" that they benefit the Government of Libya. There is no exception for transactions by a person, who falls within the definition of the "Government of Libya," to the extent that a transaction is characterized as in a "personal sphere."

The plain language of the regulations does not require OFAC to determine that the ultimate beneficiary of the

property transfer is the SDN personally, as opposed to the SDN acting on behalf of the Government of Libya.[3] Once a person falls under the LSRs' definition of the "Government of Libya," the LSRs and the executive orders broadly block "*all* property and interests in property . . . in the United States . . ." and allow prohibition of "transfers of any property or any transactions involving the transfer of *anything* of economic value by any United States person to the Government of Libya [as defined]." *See* Executive Order No. 12,543 (emphasis added).

Applying a deferential standard of review, this court finds OFAC's interpretation of the LSRs to be consistent with and supported by the language of the regulations and the executive orders. *See Chevron*, 104 S. Ct. at 2782; *see also Consarc*, 71 F.3d at 915 ("an interpretation of the [blocking regulations] by OFAC, being an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation"). OFAC's interpretation that the executive orders and the LSRs allow it to block all property of controlled entities of Libya, without determining whether the particular transaction at issue will ultimately benefit or serve the

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3. *Cf. DeCuellar v. Brady*, 881 F.2d 1561 (11th Cir. 1989) (the Treasury "is at least presumptively acting reasonably, and without being subject to the charge of arbitrary and tyrannical action, if it assumes that assets owned by a Cuban corporation are indeed assets in which there is a Cuban national interest"), *cert. denied*, 111 S. Ct. 245 (1990). By analogy, OFAC was reasonable in assuming that any funds received from a Libyan SDN would be property in which the Government of Libya has an interest.

interests of the Government of Libya, directly or indirectly, is a reasonable interpretation of the language of the provisions. The interpretation is consistent with the sanction's stated goals of isolating Libya by severing its economic ties to the rest of the world. *See Miranda v. Secretary of the Treasury*, 766 F.2d 1, 5 (1st Cir. 1985); *cf. Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981), *cert. denied*, 495 U.S. 1069 (1982) (the act "deprive[s] enemies, actual or potential, of an opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country").

This court finds unpersuasive Paradissiotis' argument that the language of the regulations precludes OFAC's position that Paradissiotis cannot exercise his Coastal options under an exception for "personal sphere" transactions of an SDN.

2. Property Acquired Before the LSRs Were Issued

Paradissiotis argues that OFAC erred in blocking his exercise of his Coastal stock options under the LSRs because he earned the stock options before the President issued the 1986 executive orders and before the LSRs were promulgated.

The LSRs provide that:

> no property or interests in property of the Government of Libya that *are* in the United

> States that hereafter come within the United States or that *are* or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.

31 C.F.R. § 550.209(a) (emphasis added). The LSRs cover property that was in the United States in 1986[4] and property that came into the United States "[t]hereafter." 31 C.F.R. § 550.209(a). Property that was in the United States on January 8, 1986 includes property that was acquired before January 8, 1986.

The regulations do not make the date on which property was acquired a limiting factor. Nothing in the language of the regulations supports Paradissiotis' argument that the LSRs do not apply to property acquired before 1986. To the contrary, the property to which the regulations apply is broadly defined. The regulations provide that the "terms property and property interests shall include, but not by way of limitation, money, checks, . . . any other financial securities, . . . any other evidences of title, . . . contracts of any nature whatsoever, . . . any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future or contingent." 31 C.F.R. § 550.314.

An interpretation of the LSRs that takes into account the presence of an SDN's property in the United States, but

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4. The effective date of LSR section 550.209 was 4:10 p.m. e.s.t., January 8, 1986. 31 C.F.R. § 550.301(c).

not the date the SDN acquired the property, is consistent with the stated goal of the sanctions, to "limit[] Libya's ability to rely on non-U.S. individuals like Plaintiff to fulfill its economic goals in the world markets and ensuring that property of instrumentalities of the Government of Libya located in the United States is not ultimately used for the benefit or on behalf of the Libyan government or its controlled entities." (Docket Entry No. 45, p. 30).

This court finds OFAC's interpretation of the LSRs to include property acquired before January 1986 supported by the language of the LSRs and a reasonable application of the regulatory provisions. *See generally Chevron*, 104 S. Ct. at 2782; *see also Milena*, 995 F.2d 620 (the court upheld the detention of four vessels, blocked "*quickly* following the issuance" of sanctions orders against the Federal Republic of Yugoslavia, and presumably acquired before the issuance of the orders); *cf. DeCuellar*, 881 F.2d 1561 (the court upheld the Secretary's denial of a license authorizing the liquidation of trust assets, and maintained the blocking of assets of a trust created in 1936, before the promulgation of the Cuban Assets Control Regulations in 1963); *cf. Consarc*, 71 F.3d 909 (the court upheld a 1990 block on $6.4 million pledged in 1989).

Paradissiotis has not established that OFAC's interpretation of the LSRs is unreasonable or clearly forbidden by the statutory provisions. *Consarc*, 71 F.3d at 914.

Appendix C

C. OFAC's Interpretation of the LSRs: The Person at Issue

Paradissiotis argues that OFAC erred in designating him an SDN of Libya under 31 C.F.R. § 550.304(c). Paradissiotis does not dispute the breadth or depth of his long-standing relationships with companies directly or indirectly controlled by the Government of Libya. Paradissiotis challenges OFAC's determination that Paradissiotis' position as an officer of a corporation controlled by a corporation owned by a holding company of the Government of Libya[5] rendered Paradissiotis an SDN, an "instrumentalit[y] or entit[y] . . . owned or controlled directly or indirectly by" the Government of Libya. *See* 31 C.F.R. § 550.304.

Paradissiotis asserts that he was "an appointee representative [in HICL and HEMCL] of a minority shareholder [HOTL] to protect [HOTL] interests against the [Government of Libya] majority ownership"; and that he worked "exclusively for the purpose of protecting the financial interest of HOTL, which indirectly protects U.S. interests, in a company controlled by the [Government of Libya." (Docket Entry No. 23, Tab A, pp. 25-26). Paradissiotis does not dispute that as president and director he has a fiduciary duty to act in the best interest of HICL and HEMCL, to benefit the companies and all their shareholders, including the Government of Libya.

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5. Paradissiotis appears to agree that HICL was controlled by the Government of Libya in 1991. *See* Docket Entry No. 23, Tab A, pp. 25-26 ("a company now controlled by the GOL").

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This court finds that in designating Paradissiotis an SDN of Libya, OFAC acted within its authority, adequately considered the relevant factors, and provided a reasoned basis for its decision. *Overton Park*, 91 S. Ct. at 823-25. In light of the administrative record and the broad purposes of the LSRs, OFAC's determination was reasonable. *See Milena Ship Management Co. v. Newcomb*, 995 F.2d 620, 624 (5th Cir. 1993); *see also IPT Company v. United States*, 1994 WL 613371 (S.D.N.Y. 1994); *see also DeCuellar*, 881 F.2d 1561.

Paradissiotis argues that in 1993, Oilinvest B.V. transferred 55 percent of its outstanding shares to "foreign persons which are not owned or controlled by the [Government of Libya], . . . eliminat[ing] any Libyan control [of] HICL and [leaving] an effective interest in HICL of 30 percent to the [Government of Libya]." (Docket Entry No. 23, Tab A, p. 53). OFAC investigated the change in the stock ownership and concluded that the Government of Libya still effectively controlled HICL. OFAC determined that the change in the HICL stock ownership was a response to the United Nations Security Council resolution calling on member states to freeze qualifying financial resources of the Government of Libya within their territories. (Docket Entry No. 23, Tab A, pp. 55-60, 339-41, 348). The "foreign persons" who acquired the aggregate 55 percent interest in Oilinvest B.V. were "minority partners in a number of Oilinvest European affiliates"; several of them were determined by OFAC to have had ties to Libya. (Docket Entry No. 23, Tab A, p. 57). After September 1993, no single shareholder held more than a seven percent share in Oilinvest B.V., except the Government of Libya, which

owned forty-five percent. (Docket Entry No. 23, Tab A, p. 275). OFAC concluded that the Government of Libya maintained direct or indirect control in Oilinvest B.V. and HICL after 1993.[6] This court finds OFAC adequately considered the relevant issues and provided a reasoned basis for its decision. *See Overton Park*, 91 S. Ct. at 823-25.

OFAC determined that Paradissiotis, as president and board member of entities controlled directly or indirectly by the Government of Libya, was himself an instrumentality of the Government of Libya, who acted or had acted directly or indirectly on behalf of the Government of Libya, or was controlled directly or indirectly by the Government of Libya.

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6. OFAC notified Paradissiotis that it had "determined that changes which the [Government of Libya] made in the shareholding structure of Oilinvest shortly before November 11, 1993, when the United Nations Security Council adopted Resolution No. 883 calling upon member states to freeze Libyan assets, did not in any way dissipate [Libyan] control of Oilinvest. Although the readjustment nominally reduced the [Government of Libya's] role to that of minority shareholder, the United States Government does not view these steps as having terminated the [Government of Libya's] effective control over Oilinvest. Indeed European individuals to whom the [Government of Libya] divested its shares subsequently were determined to be SDNs of Libya. *See* 59 Fed. Reg. 51,106 (October 7, 1994). [OFAC] notes that the change in ownership interest was made at a time when the Security Council's deliberations on further Libyan sanctions had become public. It remains the position of the United States government that Oilinvest is an entity of the [Government of Libya]. we therefore find unpersuasive [Paradissiotis'] assertion . . . that there is 'no relationship between Mr. Paradissiotis and any Libyan entities." (Docket Entry No. 23, Tab A, pp. 9-10).

OFAC's determination was rational and not plainly inconsistent with the LSRs. *See Milena Ship Management Co.*, 995 F.2d at 624; *see also Miranda*, 766 F.2d at 4.

Having determined that Paradissiotis was an SDN, based on its reasonable interpretation of the LSRs, OFAC acted rationally in blocking "*all* [Paradissiotis'] property and interests in property" within United States jurisdiction, without regard to the time the property was acquired or whether the property was of a "personal" nature. *See* Executive Order No. 12,543; *see also* 31 C.F.R. § 550.209.

Paradissiotis' challenge to OFAC's interpretation and application of the LSRs, by designating Paradissiotis as an SDN and prohibiting Paradissiotis from exercising his Coastal stock options, is meritless.

IV. The Constitutional Claims

A. The Bill of Attainder Claim

Paradissiotis argues that "OFAC's legislative promulgation of the SDN List and [OFAC's] broad interpretation of its authorization and power to use such SDN List . . . constitute[] a prohibited bill of attainder under the Constitution, Article I, Section 9, Clause 3." (Docket Entry No. 33, p. 9). Paradissiotis "does not assert . . . that the IEEPA or the Executive Orders constitute a bill of attainder." (*Id.*).

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual

without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 97 S. Ct. 2777, 2803 (1977); *citing* U.S. CONST., ART. I § 9 CL. 3. The "Bill of Attainder Clause . . . reflect[s] the Framers' belief that the Legislative Branch is not so well suited as the politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 85 S. Ct. 1707, 1713 (1965); *see also Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 732 (1989).[7]

The Supreme Court has not resolved whether an executive administrative agency's actions may be challenged as a bill of attainder. *See Dehainaut v. Pena*, 32 F.3d 1066, 1070-71 (7th Cir. 1994) ("the Supreme Court has not directly ruled either way on the applicability of the attainder ban to actions of executive and administrative agencies[;] . . . historically, [the attainder ban] was viewed as a limitation on the power of the legislature alone"), *cert. denied*, 115 S. Ct. 1427 (1995). However, several courts have suggested that the constitutional prohibition applies

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7. *See also Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 732 (1989) ("legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The Constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern abut the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed") (Stevens, J., concurring in part and concurring in judgment).

only to legislative acts. *See Walmer v. United States*, 52 F.3d 851, 855 (10th Cir.) ("the bulk of authority suggests that the constitutional prohibition against bills of attainder applies to legislative acts, not to regulatory actions of administrative agencies"), *cert. denied*, 116 S. Ct. 474 (1995); *see also Korte v. OPM*, 797 F.2d 967 (Fed. Cir. 1986) ("[t]he clause is a limitation on the authority of the legislative branch. . . . [Plaintiff] has cited no authority, and we are aware of none, holding that the clause applies to the executive branch"); *see also Nixon*, 97 S. Ct. at 2803; *see also Brown*, 85 S. Ct. at 1713 ("the *Legislative Branch* is not so well suited"); *see also Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994) ("the prohibitions on 'Bills of Attainder' in Art. I, §§ 9-10, prohibit *legislatures* from singling out disfavored persons and meting out summary punishment for past conduct"); *cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 71 S. Ct. 624 (1951).

If the bill of attainder provision applies to the regulatory acts of administrative agencies carrying out executive orders, it may do so by applying to "functional equivalents" of legislative acts. *See Dehainaut*, 32 F.3d at 1071. OFAC's designation of Paradissiotis as an SDN and OFAC's publication of that designation are not "lawmaking" in the traditional sense. *See United States v. Ellen*, 961 F.2d 462, 466 (4th Cir. 1992) (the court found an agency manual interpretive, not legislative, because it did not "purport to create new law or impose new rights or duties . . . and it was not promulgated through the notice and comment rulemaking procedures of the [APA] through which all legislative rules must pass"), *cert. denied*, 506 U.S. 875 (1992).

Appendix C

OFAC argues that by designating a list of SDNs, OFAC does not make law but provides constructive notice to United States persons that financial and commercial transactions with those on the list are prohibited without a license. (Docket Entry No. 45, p. 21). OFAC argues that if it had not published its SDN list that included Paradissiotis, the IEEPA, the executive orders, and the LSRs would still prohibit any United States person with actual notice of Paradissiotis' status as an instrumentality of the Government of Libya from engaging in prohibited transactions with Paradissiotis. Docket Entry No. 45, p. 21; *citing* 31 C.F.R. §§ 550.201-550.209. "OFAC's SDN list, which merely publicly announces Plaintiff's status under the blocking orders but does not change his status, is not the functional equivalent of a legislative enactment as contemplated by the Bill of Attainder Clause." (Docket Entry No. 45, pp. 21-22).

This court assumes, without deciding, for the purpose of this motion, that Paradissiotis may challenge OFAC's publication of the list of SDNs that included Paradissiotis' name as a bill of attainder. To defeat summary judgment, Paradissiotis must raise an issue as to three necessary elements of a bill of attainder: 1) specification of the affected persons; 2) punishment; and 3) lack of a judicial trial. *Dehainaut*, 32 F.3d at 1070.

Paradissiotis argues that the identification of an individual by name should raise an almost conclusive presumption of unconstitutionality. (Docket Entry No. 33, p. 13). However, a finding of a bill of attainder "requires not merely 'singling out' but also punishment" and the

absence of a judicial trial. *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 n.9 (1995) ("the premise that there is something wrong with a particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common"); *citing United States v. Lovett*, 66 S. Ct. 1073, 1078-1080 (1946); *Nixon*, 97 S. Ct. at 2805 (Congress may legislate "a legitimate class of one").

The Supreme Court has set out a three-pronged test to determine whether a particular enactment inflicts punishment: 1) does the enactment fall within the historical meaning of legislative punishment; 2) when viewed in terms of the type and severity of burdens imposed, does the enactment further nonpunitive legislative purposes; and 3) does the record evince an intent to punish. *See Selective Service System v. Minnesota Public Interest Research*, 104 S. Ct. 3348, 3356 (1984); *see also Nixon*, 97 S. Ct. at 2806-2807. With regard to the first prong, "at common law, bills of attainder traditionally imposed the death penalty, imprisonment, banishment, and the punitive confiscation of property." *Walmer v. United States Department of Defense*, 835 F. Supp. 1307, 1314-15 (D. Kan. 1993), *aff'd*, 52 F.3d 851 (10th Cir.), *cert. denied*, 116 S. Ct. 474 (1995). "A legislative enactment barring designated individuals or groups from participation in specified employments or vocations [has been added] to the list of historically impermissible punishments." *Dehainaut*, 32 F.3d at 1071; *citing Nixon*, 97 S. Ct. at 2806. With regard to the second prong, an "enactment may pass scrutiny under bill of attainder analysis if it seeks to achieve legitimate and non-

punitive ends and was not clearly the product of punitive intent." *Dehainaut*, 32 F.3d at 1071. Finally, the Supreme Court has narrowly construed the third prong, whether the record evinces an intent to punish, requiring "unmistakable evidence of punitive intent" before invalidating an enactment. *Selective Service*, 104 S. Ct. at 3356, *cited in Dehainaut*, 32 F.3d at 1072.

Paradissiotis does not raise a fact issue that his SDN designation is legislative punishment within its historical meaning. *See Nixon*, 97 S. Ct. at 2806-2807 ("forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences"); *see also United States v. Lovett*, 66 S. Ct. 1073, 1083 (1946) ("the fact that harm is inflicted by governmental authority does not make it punishment"). The administrative record does not evince an intent to punish Paradissiotis. *See Dehainaut*, 32 F.3d at 1072.

The SDN lists, published as part of OFAC's implementation of the Libyan sanctions, have a legitimate governmental purpose. Courts have upheld blocking orders such as the Libyan sanctions, finding a general purpose of "preserving the assets involved for possible use in some satisfaction of American claims against the country involved," *Nielsen v. Secretary of the Treasury*, 424 F.2d 833, 840 (D.C.Cir. 1970), of putting "control of foreign assets in the hands of the President. . . ." *Propper v. Clark*, 337 U.S. 472, 493 (1949), and of "serv[ing] as a bargaining chip to be used by the President when dealing with a hostile country." *Dames & Moore v. Regan*, 453 U.S.

654, 673 (1981).[8] OFAC's designation of Paradissiotis as an SDN of Libya does not punish Paradissiotis within the meaning of the bill of attainder clause. *See Dehainaut*, 32 F.3d at 1070-72.

OFAC has not violated the bill of attainder provision of the Constitution.

B. The Ex Post Facto Law Claim

The ex post facto provision of the United States Constitution forbids Congress from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 101 S. Ct. 960, 964 (1981). The provision "appli[es] only to penal legislation." *Landgraf*, 114 S. Ct. at 1497 n.19; *citing Calder v. Bull*, 3 Dall. 386, 390-91, 1 L. Ed. 648 (1798); *see also Korte v. OPM*, 797 F.2d 967, 972 (Fed. Cir.. 1986) ("from 'earliest times,' the Supreme Court has construed the ex post facto provision to apply only to criminal laws"). The provision prohibits criminal laws that punish as a crime an act previously committed, which was innocent when done, make more burdensome the punishment for a crime already committed, or deprive one

8. In *Deveau v. Braisted*, 80 S. Ct. 1146, 1155 (1960), the Supreme Court upheld a state statute disqualifying convicted felons from serving in any office in a waterfront labor organization, noting that the statute's purpose was not to punish "but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony."

charged with a crime of any defense available according to law at the time the crime was committed. *Collins v. Youngblood*, 110 S. Ct. 2715, 2723 (1990); *see Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (the provision prohibits "penal legislation which imposes or increases criminal punishment"); *see also United States v. Domino*, 62 F.3d 716, 720 (5th Cir. 1995)("a criminal law is ex post facto . . ."); *see also Dehainaut*, 32 F.3d at 1073.

The executive orders, the LSRs, and the SDN list, intended to limit the Government of Libya's ability to benefit from property interests located within the United States, are not criminal punishments for crimes committed by Paradissiotis before the implementation of the orders and regulations. *Cf. Landgraf*, 114 S. Ct. at 1499 n.24 ("[e]ven uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct . . .[;] if every time a man relied on existing law in arranging his affairs, he were made secure against change in legal rules, the whole body of our law would be ossified forever . . .[;] a statute is not made retroactive merely because it draws upon antecedent facts for its operation") (internal quotations and citations omitted).

OFAC's designation of Paradissiotis as a Libyan SDN does not violate the ex post facto provision of the Constitution.

C. The Due Process Claim

The due process clause of the Fifth Amendment to the United States Constitution provides that no person shall "be

deprived of life, liberty, or property, without due process of law." In determining whether a "questioned governmental activit[y] impairs a valid contract to such a degree as to constitute a compensable taking, the [Supreme] Court . . . identified three factors as having particular significance: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action." *Chang v. United States*, 859 F.2d 893, 895 (Fed. Cir.. 1988) (internal quotations omitted); *citing Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1027 (1986). "[T]he fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly*, 106 S. Ct. at 1026.

In *Chang*, the plaintiffs had been working as petroleum engineers in Libya under private, written employment contracts entered into in 1985 with Sirte Oil Company, a Libyan corporation. 859 F.2d 893 (Fed. Cir. 1988). In 1986, after the executive orders and LSR, plaintiffs returned to the United States and sued the government alleging that the termination and irretrievable loss of their employment contracts with Sirte, a practical result of the Libyan sanctions, was a taking under the Fifth Amendment. *Id.* The *Chang* court found that the government "did not appropriate to the public use, *i.e.*, 'take' either plaintiffs' employment contracts or the plaintiffs' services." *Id.* at 896. The court also stated that, "to the extent [that] the Libyan Sanction Regulations are alleged to have interfered with distinct investment-backed expectations of the plaintiffs, we note that legislation readjusting rights and burdens is not

unlawful solely because it upsets otherwise settled expectations. . . . The Constitution explicitly grants to Congress the power to regulate commerce with the foreign nations. . . . [T]he plain language chosen by Congress in the IEEPA delegated to the President sweeping and unqualified powers to nullify, void, prevent or prohibit any right, power or privilege in any property in which any foreign country or a national thereof has any interest. . . . As the Supreme Court set forth in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 551, 20 L. Ed. 287 (1870), a valid governmental exercise of its constitutional power to regulate commerce with foreign nations can have the consequential effect of altering the obligations of preexisting contracts without giving rise to a taking." *Chang*, 859 F.2d at 897; *citing Usery v. Turner Elkhorn Mining Co.*, 96 S. Ct. 2882, 2892 (1976); *see also Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981), *cert. denied*, 495 U.S. 1069 (1982); *see also Miranda v. Secretary of the Treasury*, 766 F.2d 1 (1st Cir. 1985); *see also IPT Company v. United States*, 1994 WL 613371 (S.D.N.Y. 1994).[9] Finally, the *Chang* court noted that the

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9. In *Tran Qui Than v. Regan*, 658 F.2d 1296 (9th Cir. 1981), *cert. denied*, 495 U.S. 1069 (1982), the court found that the refusal of the Treasury Secretary to unblock certain funds blocked under OFAC regulations pertaining to Vietnam did not violate the due process clause of the Fifth Amendment. The court "recognize[d] that blocking involves a deprivation of the enjoyment of a property interest. The deprivation . . ., however, is not equivalent to vesting. Vesting occurs when title to assets is transferred to the government; blocking does not transfer title but rather prohibits temporarily, transactions involving those assets. [The court] also recognize[d] that an action intended by the government to be a temporary block on any transactions involving those assets may amount to an

(Cont'd)

plaintiffs had no legitimate expectation, given the foreign policy implications of the contracts, that their commercial interests were immune from the fallout of deteriorating relations between the United States and Libya. *Chang*, 859 F.2d at 897.

The constitutionality of OFAC's blocking orders has withstood due process challenges in case law. *See Miranda*, 766 F.2d at 5 ("the temporary freezing of foreign-owned assets in this country falls within the constitutional limits of the Fifth Amendment"). Paradissiotis, like the plaintiffs

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(Cont'd)

interminable denial of property to the individual who must await the often slow and labyrinthian course of international relations." *Tran Qui Than*, 658 F.2d at 1304. In *Miranda v. Secretary of the Treasury*, 766 F.2d 1 (1st Cir. 1985), the court found that the Secretary's denial of a license to unblock funds blocked under OFAC regulations pertaining to Cuba was not a violation of the due process clause. The court relied in part on the reasoning of *Tran Qui Than* and also noted that "the [OFAC] prohibition is rationally related to the objective of maintaining an economic embargo" on Cuba. *Miranda*, 766 F.2d at 5. In *IPT Company v. United States*, 1994 WL 613371 (S.D.N.Y. 1994), the court found that the blocking of assets of a corporation, specially designated a Yugoslav national, was not a taking under the Fifth Amendment. "It is long settled law that the Executive branch has broad power to determine foreign policy and its implementation. It is not for this Court to decide the appropriateness of those determinations. . . The temporary freezing of foreign-owned assets in this country falls within the constitutional limits of the Fifth Amendment and has been used repeatedly as a means of implementing policy. . . The court . . . further finds that defendants' action amounts to a temporary deprivation of property and as such defendants' are not required to grant predeprivation hearings before the enforcement of a temporary blocking order." *IPT Company*, 1994 WL 613371.

in *Chang*, has not suffered a taking of his "right to contract" in violation of the due process clause. The government did not "take" or appropriate Paradissiotis' property interests for public use, but rather "blocked" assets within United States jurisdiction. *See Chang*, 859 F.2d at 897. The blocking serves rational purposes related to national security, an economic embargo, and efforts to isolate the Government of Libya in response to its terroristic activities. *Cf. Miranda*, 766 F.2d at 5.

OFAC has not violated Paradissiotis' rights under the due process clause of the Fifth Amendment.

D. The Sixth Amendment Claim

OFAC requires a license for a United States person to receive compensation from a Libyan SDN for legal services provided.[10] 31 C.F.R. §§ 550.517(b) and 550.209.

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10. OFAC does not require a license for a United States person to provide the following uncompensated legal services to Libyan SDNs: "1) legal advice and counseling to the Government of Libya . . . on the requirements of and compliance with the laws of any jurisdiction within the United States . . .; 2) representation of the Government of Libya . . . when named as a defendant in or otherwise made a party to domestic U.S. legal, arbitration, or administrative proceedings; 3) initiation of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. Jurisdiction of the Government of Libya that were in existence prior to January 8, 1986; 4) representation of the Government of Libya . . . before any federal agency with respect to imposition, administration, or enforcement of U.S. sanctions against Libya; and 5) provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense." 31 C.F.R. § 550.217.

Paradissiotis argues that "OFAC's interpretative regulation . . . is overbroad in that OFAC effectively denies legal counsel to Plaintiff in contravention of the Sixth Amendment to the Constitution of the United States." (Docket Entry No. 33, p. 42).

Paradissiotis relies on *American Airways Charters, Inc. v. Regan*, 746 F.2d 865 (D.C.Cir. 1984). In *American Airways*, the plaintiff, a Florida corporation, specially designated a Cuban national, who sought to "retain counsel without obtaining in advance a government (Treasury Department, Office of Foreign Assets Control) license to do so." 746 F.2d at 866. OFAC had prohibited a United States attorney from "form[ing] an attorney-client relationship" with the corporation without a license and had "prohibited [the plaintiff corporation's president and chief executive officer] from engaging in any transactions for, on behalf of, or with [the plaintiff], without a specific license from [OFAC]." *Id.* at 868. In reviewing the case, the court limited its inquiry to one question: whether the "bare formation of an attorney-client relationship" was outside the reach of OFAC. *Id.* at 871-72. The court "h[e]ld that although government permission, in the form of an Office of Foreign Assets Control license, is required prior to the execution of any transaction reaching the assets of a designated Cuban national, the Office of Foreign Assets Control lacks authority to condition the bare formation of an attorney-client relationship on advance of government approval." *Id.* at 866-67. The court explained that its holding would not defeat the purpose of the Cuban sanctions. "If [the plaintiff] is allowed to retain — although not to pay — counsel without government license, Cuba will not thereby

receive economic benefit from transactions with persons subject to the jurisdiction of the United States; the goal of limiting the flow of currency to Cuba will remain unimpaired; and Cuba will not gain any outlet for its goods in the United States market." *Id.* at 872.

In this case, the issue is not the "bare formation of an attorney-client relationship" but the compensated representation of an SDN by a United States attorney. *Compare id.* at 871-72. In *American Airways*, the court "caution[ed] that nothing in [its] disposition is properly read as authorizing payment to counsel without the approval of OFAC[; that] . . . no fee can be paid counsel absent a separate, and express, authorization from OFAC" and generally, that legislation "gives OFAC authority to control, in almost every respect, [the corporation's] commercial relations with the outside world." *Id.* at 875, 874, 872. *American Airways* does not support Paradissiotis' argument in this case.

It is undisputed that OFAC granted Paradissiotis' counsel a license to represent Paradissiotis and to receive payment for that representation. (Docket Entry No. 23, Tab A, pp. 68A-68C). OFAC has not caused Paradissiotis injury under the Sixth Amendment. *See Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). Paradissiotis argues vaguely that he is threatened with injury because: "[w]hen OFAC identified Plaintiff as a SDN, OFAC then had the mechanism to threaten criminal prosecution pursuant to the penalties of the LSR if any U.S. legal counsel offered legal advice to Mr. Paradissiotis that would facilitate business transactions of the [Government of Libya]." (Docket Entry

No. 33, p. 42). There is no evidence that Paradissiotis faces imminent prosecution. *See Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987) (the court found that a plaintiff who had traveled to Libya despite the Libyan sanctions and who had received, prior to his trip, a letter from the Attorney General stating that plaintiff "should be prosecuted" for the trip, had "not shown that the threat of prosecution was genuine"), *aff'd*, 851 F.2d 1500 (D.C.Cir. 1988) (table disposition). "Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1665 (1983). In addition, the "Sixth Amendment right to counsel . . . does not attach until the initiation of an adversary judicial process in respect to a specific crime." *Arrington v. County of Dallas*, 970 F.2d 1441, 1445 (5th Cir. 1992) (the court found that the plaintiff's "rights under the Sixth Amendment were not implicated" because no judicial "proceeding had [] been commenced"); *citing McNeil v. Wisconsin*, 111 S. Ct. 2204 (1991).

OFAC has not denied Paradissiotis his Sixth Amendment right to counsel.

V. The Application for a Preliminary Injunction

Paradissiotis has not met the first requirement necessary for the injunctive relief that he seeks: a showing that he has a substantial likelihood of prevailing on the merits. *See Enterprise International*, 762 F.2d at 472. This court therefore denies the application for a preliminary injunction.

Appendix C

VI. The Motion for Discovery

Paradissiotis has moved "this court to allow him to conduct discovery to more fully develop the record" to respond to OFAC's motion for summary judgment.[11] (Docket Entry No. 32).

Generally, "[t]he focal point for judicial review of an administrative agency's action should be the administrative record. *Camp v. Pitts*, 93 S. Ct. 1241, 1244 (1973). The role of the court is not to conduct its own investigation and substitute its own judgment for the administrative agency's decision. . . . Rather, the task of the reviewing court is to apply the appropriate . . . standard of review . . . to the agency decision based on the record the agency presents to

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11. During a telephone conference held March 4, 1997, Paradissiotis' counsel stated that Paradissiotis did not need to conduct the requested discovery to enable this court to determine whether Paradissiotis has a substantial likelihood of prevailing on the merits and whether he is entitled to preliminary relief. (Docket Entry No. 42).

Paradissiotis asserts the need to conduct discovery regarding his argument that OFAC did not apply the same standards to other similarly situated individuals. (Docket Entry No. 32). Paradissiotis does not assert an equal protection argument but rather that OFAC's selective enforcement evidences the arbitrary nature of OFAC's decisionmaking. Assuming, without deciding, that OFAC may not have applied the LSRs identically to other individuals, the case-by-case nature of the determination, the undisputed legal and factual basis for OFAC's application of the LSRs to Paradissiotis, and the deferential standard of review preclude this argument as a basis for either discovery or success on the merits.

the reviewing court. . . . If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. . . . Thus while certain circumstances may justify going beyond the administrative record, a court conducting a judicial review is not generally empowered to do so." *Preserve Endangered Areas of Cobb's History Inc. v. United States Army Corps of Engineers*, 87 F.3d 1242, 1246 (11th Cir. 1996); *see also USA Group Loan Services v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996) (the court found that the plaintiffs were not entitled to conduct additional discovery concerning their allegations that the Department of Education negotiated in bad faith); *see also National Nutritional Foods Association v. Food and Drug Administration*, 491 F.2d 1141, (2d. Cir. 1974) ("it is not the function of this court to probe the mental processes of the [agency administrator;] . . . strong preliminary showings of bad faith have been required . . . before the taking of testimony has been permitted with regard to internal agency deliberations").

"Supplementation of an administrative record is only allowed in the following circumstances: 1) the record is so inadequate to explain the agency action that it effectively frustrates judicial review; 2) the record is incomplete in that it does not contain documents considered by the decisionmaker; 3) the agency has failed to consider relevant factors; or 4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith." *United*

States v. Amtreco Inc., 806 F. Supp. 1004, 1006 (M.D. Ga. 1992); *citing Animal Defense Council v. Hodel*, 840 F.2d 1432 (9th Cir. 1988), *corrected*, 867 F.2d 1244 (9th Cir. 1989); *see also Moretti v. Hoffman*, 526 F.2d 1311 (5th Cir. 1976) (the court upheld the denial of discovery by a plaintiff who asserted that the administrative processing of his permit was a "sham," that documents favorable to his case were "omitted," that he "received unequal treatment with other applicants," that the administrative application denial was "founded on a punitive motivation," and that there was "no substantial evidence to support the decision"); *see also Avoyelles Sportsmen's League Inc. v. Marsh*, 715 F.2d 897, 905 (5th Cir. 1983); *cf. Center for Marine Conservation v. Brown*, 917 F. Supp. 1128, 1144 n.10 (S.D. Tex. 1996).

Paradissiotis has not made a "strong showing" of bad faith on the part of OFAC. Specifically, he has not identified relevant factors that OFAC failed to consider in its denial of his license applications or shown that the record is inadequate to explain OFAC's actions. *See Moretti*, 526 F.2d at 1312; *see also Animal Defense Council*, 840 F.2d at 1437; *see also National Nutritional Foods*, 491 F.2d at 1145. Nor has Paradissiotis specified the discovery he seeks "to more fully develop the record." (Docket Entry No. 32). This court has found that in designating Paradissiotis an SDN of Libya and denying his license requests, OFAC acted within its authority, adequately considered the relevant factors, and provided a reasoned basis for its decision. *Overton Park*, 91 S. Ct. at 823-25.

Paradissiotis' motion to allow discovery is DENIED.

Appendix C

VII. Conclusion

This court DENIES Paradissiotis' motion to conduct discovery; GRANTS defendants' motion for summary judgment; and DENIES Paradissiotis' application for a preliminary injunction.

SIGNED on March 17, 1997.

s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

APPENDIX D — PRESIDENTIAL EXECUTIVE ORDER 12543 DATED JANUARY 7, 1986

Executive Order 12543

Prohibiting Trade and Certain Transactions Involving Libya

January 7, 1986

By the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergency Act (50 U.S.C. 1601 et seq.), sections 504 and 505 of the International Security and Development Cooperation Act of 1985 (Public Law 99-83), section 1114 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1514), and section 301 of title 3 of the United States Code,

I, RONALD REAGAN, President of the United States of America, find that the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order:

(a) The import into the United States of any goods or services of

Libyan origin, other than publications and materials imported for news publications or news broadcast dissemination;

(b) The export to Libya of any goods, technology (including technical data or other information) or services from the United States, except publications and donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes;

(c) Any transaction by a United States person relating to transportation to or from Libya; the provision of transportation to or from the United States by any Libyan person or any vessel or aircraft of Libyan registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of any transportation by air which includes any stop in Libya;

(d) The purchase by any United States person of goods for export from Libya to any country;

(e) The performance by any United States person of any contract

in support of an industrial or other commercial or governmental project in Libya;

(f) The grant or extension of credits or loans by any United States person to the Government of Libya, its instrumentalities and controlled entities;

(g) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Libya, or to activities by any such persn within Libya, after the date of this Order, other than transactions necessary to effect such person's departure from Libya, to perform acts permitted until February 1, 1986, by Section 3 of this Order, or travel for journalistic activity by persons regularly employed in such capacity by a newsgathering organization; and

(h) Any transaction by any United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order.

For purposes of this Order, the term "United States person" means any United States citizen, permanent resident

alien, juridical person organized under the laws of the United States or any person in the United States.

Sec. 2. In light of the prohibition in Section 1(a) of this Order, section 251 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1881), and section 126 of the Trade Act of 1974, as amended (19 U.S.C. 2136) will have no effect with respect to Libya.

Sec. 3. This Order is effective immediately, except that the Prohibitions set forth in Section 1(a), (b), (c), (d) and (e) shall apply as of 12:01 a.m. Eastern Standard Time, February 1, 1986.

Sec. 4. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order. Such actions may include prohibiting or regulating payments or transfers of any property or any transactions involving the transfer of anything of economic value by any United States person to the Government of Libya, its instrumentalities and controlled entities, or to any Libyan national or entity owned or controlled, directly or indirectly, by Libya or Libyan nationals. The Secretary may redelegate any of these functions to other officers and agencies of the Federal government. All agencies of the United States government are directed to

take all appropriate measures within their authority to carry out the provisions of this Order, including the suspension or termination of licenses or other authorizations in effect as of the date of this Order.

This Order shall be transmitted to the Congress and published in the Federal Register.

RONALD REAGAN
THE WHITE HOUSE,
January 7, 1986.

APPENDIX E — PRESIDENTIAL EXECUTIVE ORDER 12544 DATED JANUARY 8, 1986

Executive Order 12544

Blocking Libyan Government Property in the United States or Held by U.S. Persons

January 8, 1986

By the authority vested in me as President by the Constitution and laws of the United States, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.) and section 301 of title 3 of the United States Code, in order to take steps with respect to Libya additional to those set forth in Executive Order No. 12543 of January 7, 1986, to deal with the threat to the national security and foreign policy of the United States referred to in that Order,

I, RONALD REAGAN, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons, including overseas branches of U.S. persons.

The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to employ all powers granted to me by the International Emergency Economics Power Act, 50 U.S.C. 1701 et seq., to carry out the provisions of this Order.

Appendix E

This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.

RONALD REAGAN
THE WHITE HOUSE,
January 8, 1986.

APPENDIX F — RELEVANT REGULATIONS

31 C.F.R. § 550.202

§ 550.202 Prohibited exports of goods, technology or services to Libya.

Except as authorized, no goods, technology (including technical data or other information) or services may be exported to Libya from the United States, except publications and donated articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes.

* * *

31 C.F.R. § 550.205

§ 550.205 Prohibited engagement in contracts.

Except as authorized, no U.S. person may perform any contract in support of an industrial or other commercial or governmental project in Libya.

* * *

31 C.F.R. § 550.209

§ 550.209 Prohibited transactions involving property in which the Government of Libya has an interest; transactions with respect to securities.

(a) Except as authorized by regulations, rulings, instructions, licenses, or otherwise, no property or interests

in property of the Government of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons, including their overseas branches, may be transferred, paid, exported, withdrawn or otherwise dealt in.

(b) Unless authorized by a license expressly referring to this section, the acquisition, transfer (including the transfer on the books of any issuer or agent thereof), disposition, transportation, importation, exportation, or withdrawal of, or the endorsement or guaranty of signatures on or otherwise dealing in any security (or evidence thereof) registered or inscribed in the name of the Government of Libya is prohibited irrespective of the fact that at any time (either prior to, on, or subsequent to 4:10 p.m. e.s.t., January 8, 1986) the registered or inscribed owner thereof may have, or appears to have, assigned, transferred or otherwise disposed of any such security.

* * *

31 C.F.R. § 550.304

§ 550.304 Government of Libya.

The term *Government of Libya* includes:

(a) The state and the Government of Libya, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Libya;

(b) Any partnership, association, corporation, or other organization owned or controlled directly or indirectly by the foregoing;

(c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing;

(d) Any other person or organization determined by the Secretary of the Treasury to be included within this section.

* * *

31 C.F.R. § 550.305

§ 550.305 Libyan person.

The term *Libyan person* means any Libyan citizen, any juridical person organized under the laws of Libya, or any juridical person owned or controlled, directly or indirectly, by a Libyan citizen or the Government of Libya.

* * *

31 C.F.R. § 550.308

§ 550.308 United States person.

The term *United States person* or, as abbreviated, *U.S. person,* means any United States citizen, permanent resident

alien, juridical person organized under the laws of the United States, or any person in the United States.

* * *

31 C.F.R. § 550.316

§ 550.316 Blocked account; blocked property.

The terms *blocked account* and *blocked property* shall mean any account or property in which the Government of Libya has an interest, with respect to which payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to an authorization or license authorizing such action.

* * *

31 C.F.R. § 550.422

§ 550.422 Exportation of services; performance of service contracts; legal services.

(a) The prohibition on the exportation of services contained in § 550.202 applies to services performed:

(1) In the United States;

(2) By an entity located in the United States, including its overseas branches; or

(3) Outside the United States by an individual U.S. person ordinarily resident in the United States; on behalf

of the Government of Libya, or where the benefit of such services is otherwise received in Libya. The benefit of services performed anywhere in the world on behalf of the Government of Libya, including services performed for a controlled entity or specially designated national of the Government of Libya, is presumed to be received in Libya.

(b) The prohibitions contained in §§ 550.205 and 550.209 apply to services performed by U.S. persons, wherever located:

(1) On behalf of the Government of Libya;

(2) With respect to property interests of the Government of Libya; or

(3) In support of an industrial or other commercial or governmental project in Libya.

(c) *Example:* U.S. persons may not, without specific authorization from the Office of Foreign Assets Control, represent an individual or entity with respect to contract negotiations, contract performance, commercial arbitration, or other business dealings with the Government of Libya. See § 550.517 on licensing policy with regard to the provision of certain legal services.

* * *

Appendix F

31 C.F.R. § 550.501

§ 550.501 Effect of license or authorization.

(a) No license or other authorization contained in this part, or otherwise issued by or under the direction of the Secretary of the Treasury pursuant to section 203 of the International Emergency Economic Powers Act, shall be deemed to authorize or validate any transaction effected prior to the issuance of the license, unless such license or other authorization specifically so provides.

(b) No regulation, ruling, instruction, or license authorizes a transaction prohibited under this part unless the regulation, ruling, instruction, or license is issued by the Treasury Department and specifically refers to this part. No regulation, ruling, instruction, or license referring to this part shall be deemed to authorize any transactions prohibited by any provision of parts 500, 505, 515, 520, 535, 540, or 545 of this chapter unless the regulation, ruling, instruction or license specifically refers to such provision.

(c) Any regulation, ruling, instruction, or license authorizing a transaction otherwise prohibited under this part has the effect of removing a prohibition or prohibitions in subpart B from the transaction, but only to the extent specifically stated by its terms. Unless the regulation, ruling, instruction, or license otherwise specifies, such an authorization does not create any right, duty, obligation, claim, or interest in, or with respect to, any property which would not otherwise exist under ordinary principles of law.

* * *

Appendix F

31 C.F.R. § 550.517

§ 550.517 Exportation of certain legal services to the Government of, or persons in, Libya.

(a) The provision to the Government of Libya, or to a person in Libya, of the legal services set forth in paragraph (b) of this section is authorized, provided that all receipt of payment therefor must be specifically licensed. The provision of any other legal services as interpreted in § 550.422 requires the issuance of a specific license.

(b) Specific licenses are issued, on a case-by-case basis, authorizing receipt, from unblocked sources, of payment of professional fees and reimbursement of incurred expenses for the following legal services by U.S. persons to the Government of Libya or to a person in Libya:

(1) Provision of legal advice and counselling to the Government of Libya or to a person in Libya on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counselling is not provided to facilitate transactions in violation of subpart B of this part;

(2) Representation of the Government of Libya or of a person in Libya when named as a defendant in or otherwise made a party to domestic U.S. legal, arbitration, or administrative proceedings;

(3) Initiation of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests

subject to U.S. jurisdiction of the Government of Libya that were in existence prior to January 8, 1986, or of a person in Libya;

(4) Representation of the Government of Libya or a person in Libya before any federal agency with respect to the imposition, administration, or enforcement of U.S. sanctions against Libya; and

(5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

(c) Enforcement of any lien, judgment, arbitral award, decree or other order through execution, garnishment or other judicial process purporting to transfer or otherwise alter or affect a property interest of the Government of Libya is prohibited unless specifically licensed in accordance with § 550.210(e).

* * * *

Supreme Court, U.S.
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No. 99-44

In the Supreme Court of the United States

CHRIS PARADISSIOTIS, PETITIONER

v.

LAWRENCE H. SUMMERS, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, grants the President broad authority to impose economic sanctions on foreign governments that threaten the security of the United States. In 1986, President Reagan declared Libya to pose such a threat and issued Executive Order Nos. 12,543 and 12,544, 3 C.F.R. 181, 183 (1987), restricting commerce between the United States and Libya. Pursuant to those Orders, the Department of the Treasury promulgated the Libyan Sanctions Regulations, 31 C.F.R. Pt. 550, and in 1991 it identified petitioner—a Cypriot businessman in high-level positions with corporations controlled by Libya—as a Specially Designated National of Libya. The questions presented are as follows:

1. Whether the listing of petitioner as a Specially Designated National of Libya violated the Bill of Attainder Clause of the Constitution, Art. I, § 9, Cl. 3.

2. Whether petitioner had standing to challenge the requirement that his United States counsel obtain a license before accepting compensation for services provided.

3. Whether the courts below correctly deferred to the Treasury Department's interpretation of the Libyan Sanctions Regulations.

4. Whether IEEPA, as implemented by the Department of the Treasury, effects an unconstitutional delegation of legislative power.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 171 F.3d 983. The opinions of the district court (Pet. App. 12a-39a, 40a-83a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1999. The petition for a writ of certiorari was filed on June 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, "revise[s] and delimit[s] the President's authority to regulate international economic transactions during wars or national

emergencies." S. Rep. No. 466, 95th Cong., 1st Sess. 2 (1977). Under IEEPA, the President is authorized "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if [he] declares a national emergency with respect to such threat." 50 U.S.C. 1701(a).

Pursuant to his authority under IEEPA and the Constitution, President Reagan issued Executive Order Nos. 12,543 and 12,544. 3 C.F.R. 181, 183 (1987); see Pet. App. 2a, 13a, 41a-42a. The President declared that the government of Libya posed "an unusual and extraordinary threat to the national security and foreign policy of the United States." 3 C.F.R. 181 (1987). The Executive Orders banned commerce with Libya and froze all property interests of the Libyan government and its agents that were or thereafter came within the United States or the possession or control of United States persons. See Pet. App. 2a, 13a, 41a.

The President authorized the Secretary of the Treasury, in consultation with the Secretary of State, to take such actions as might be necessary to carry out the purposes of IEEPA and the Executive Orders. 3 C.F.R. 182, 183 (1987); see Pet. App. 14a, 42a. Pursuant to that authorization, the Secretary of the Treasury, through the Office of Foreign Assets Control (OFAC), promulgated the Libyan Sanctions Regulations. 31 C.F.R. Pt. 550; see Pet. App. 2a-3a, 14a, 42a. Those regulations block assets of the "Government of Libya" and prohibit trade and financial transactions in which the "Government of Libya" has an interest or that involve the territory of Libya. 31 C.F.R. 550.201-550.209. The regulations define the term "Government of Libya" to include the State and government of Libya

and its political subdivisions and agencies, 31 C.F.R. 550.304(a); any corporation or other organization controlled directly or indirectly by Libya, 31 C.F.R. 550.304(b); and "[a]ny person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing," 31 C.F.R. 550.304(c). A person within the latter group is referred to as a Specially Designated National (SDN) of Libya. Pet. App. 15a n.2.

2. Petitioner is a Cypriot national residing outside the United States. Pet. App. 45a; see Pet. 5. In 1991, OFAC listed petitioner as an SDN of Libya. Pet. App. 3a, 16a-17a, 47a. That designation was based on petitioner's position as president and member of the board of directors of Holborn Investment Company Limited and Holborn European Marketing Company Limited, both of which had been listed as SDNs. *Id.* at 3a, 17a n.4, 45a-47a.

Petitioner nevertheless applied to OFAC for various licenses to conduct otherwise prohibited financial transactions with United States persons, including the sale of stock options in a United States company. OFAC granted a license to petitioner's retained counsel in the United States authorizing their receipt of compensation for providing legal advice and representation. However, the agency denied petitioner's request for a license that would have allowed him to conduct personal and private business affairs with United States persons. OFAC also denied petitioner's request to be removed from the list of Libyan SDNs. Pet. App. 3a-4a, 17a-22a, 47a-52a.

3. In 1996, petitioner filed suit in federal district court. Petitioner challenged OFAC's designation of

him as an SDN. In the alternative, he contended that under the Libyan Sanctions Regulations he should be treated as the "Government of Libya" only with respect to financial transactions undertaken on behalf of Libya or a Libyan agency. Petitioner also asserted that OFAC's actions violated IEEPA, the agency's own regulations, and various constitutional provisions.

The district court granted the government's motion for summary judgment. Pet. App. 40a-83a. The court rejected petitioner's argument that OFAC had erred in construing the Libyan Sanctions Regulations to apply to (1) transactions in which petitioner had acted in a "personal" capacity rather than as an agent of the Libyan government, and (2) transactions involving property acquired by petitioner before the regulations took effect. The court examined the pertinent regulatory provisions and found "no exception for transactions by a person, who falls within the definition of the 'Government of Libya,' to the extent that a transaction is characterized as in a 'personal sphere.'" *Id.* at 57a. The court found "OFAC's interpretation of the [regulations] to be consistent with and supported by the language of the regulations and the executive orders." *Id.* at 58a.[1] It also noted that "[t]he regulations do not

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[1] The court explained:

> OFAC's interpretation that the executive orders and the [Libyan Sanctions Regulations] allow it to block all property of controlled entities of Libya, without determining whether the particular transaction at issue will ultimately benefit or serve the interests of the Government of Libya, directly or indirectly, is a reasonable interpretation of the language of the provisions. The interpretation is consistent with the sanction's stated goals of isolating Libya by severing its economic ties to the rest of the world.

Pet. App. 58a-59a.

make the date on which property was acquired a limiting factor." *Id.* at 60a.

The district court next addressed and rejected petitioner's constitutional claims. The court held that OFAC's designation of petitioner as an SDN did not inflict punishment and therefore could not be regarded as an unconstitutional bill of attainder. Pet. App. 68a-71a. The court also rejected petitioner's challenges under the Ex Post Facto Clause (U.S. Const. Art. I, § 9, Cl. 3) and the Fifth and Sixth Amendments. Pet. App. 71a-78a. The district court subsequently denied petitioner's motion for reconsideration. *Id.* at 12a-39a.

4. The court of appeals affirmed in part and vacated in part. Pet. App. 1a-11a.

The court first rejected petitioner's argument that he is subject to the Libyan Sanctions Regulations only with respect to transactions undertaken on behalf of the government of Libya. The court observed that "an agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard, and must prevail unless plainly inconsistent with the regulation." Pet. App. 6a (quoting *Consarc Corp.* v. *United States Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995)). It stated that the definition of the term "Government of Libya" contained in 31 C.F.R. 550.304(c) is intended "to cast the widest possible net over individuals who are or have been or are suspected of being actors directly or indirectly on behalf of the government of Libya." Pet. App. 6a. The court of appeals concluded that "OFAC's interpretation of its own regulation is not plainly inconsistent with the regulatory language, nor is it unreasonable, and in fact it represents the only practical interpretation." *Id.* at 8a. The court further held

that the regulation was reasonable and consistent with IEEPA and the Executive Orders. *Id.* at 8a-9a.

The court of appeals next addressed petitioner's constitutional claims.[2] The court held that the designation of petitioner as an SDN did not constitute a bill of attainder because it did not inflict punishment. Pet. App. 9a-10a.[3] The court found that the challenged provision of the Libyan Sanctions Regulations was not void for vagueness, explaining that petitioner "knows he is an SDN and is part of the 'Government of Libya' and is clearly aware of the consequences of that status." *Id.* at 10a. The court held that petitioner lacked standing to challenge the requirement that his United States counsel must obtain a license before accepting compensation for their provision of legal services. It explained that "OFAC granted [petitioner's] only request for a license to obtain counsel, and [petitioner] has not shown that he will be deprived of legal services in the future based on the regulations." *Id.* at 10a-11a. Finally, the court of appeals held that petitioner's takings claim lay within the exclusive jurisdiction of the Court of Federal Claims, and it accordingly vacated the portion of the district court's judgment dismissing that claim on the merits. *Id.* at 11a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of

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[2] The court stated that "[i]t is not clear whether, as a foreign national residing outside the U.S., [petitioner] can assert these claims, but we shall assume *arguendo* that he can." Pet. App. 9a.

[3] The court also noted that "[n]o circuit court has yet held that the bill of attainder clause applies to regulations promulgated by an executive agency." Pet. App. 9a (citation omitted).

any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 8-14) that OFAC's decision to list him as an SDN constituted a bill of attainder. The court of appeals rejected that claim, finding that "[t]he mere publication of [petitioner's] name in the list did not evince an 'intent to punish.'" Pet. App. 10a (quoting *Selective Serv. Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984)). That holding was correct. Restrictions on the disposition of assets by persons acting on behalf of the government of Libya—a government found by the President to be "an unusual and extraordinary threat to the national security and foreign policy of the United States," Exec. Order No. 12,543, 3 C.F.R. 181 (1987)—serve obvious and important non-punitive purposes. Cf. *Regan* v. *Wald*, 468 U.S. 222, 243 (1984) (government's interest in "curtail[ing] the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—" provided a sufficient justification for ban on travel to Cuba).[4]

Petitioner does not contend that either IEEPA or the relevant Executive Orders constitute bills of attainder. OFAC's listing of petitioner as an SDN is simply a way for the agency charged with administering IEEPA and the Executive Orders to provide notice

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[4] Even if petitioner could demonstrate that his listing as an SDN is punitive in nature, he could prevail on his Bill of Attainder Clause challenge only if he could show that (1) the protections of that Clause apply to foreign nationals residing outside the United States, and (2) the Clause applies to regulatory activities of an Executive agency as well as to legislation passed by Congress. The court of appeals expressed doubt as to each of those propositions but assumed *arguendo* that they are true. See Pet. App. 9a.

of his status under the Libyan sanctions program. The court of appeals properly determined that mere listing "does not inflict * * * punishment." Pet. App. 10a. That fact-specific determination creates no conflict in authority and does not warrant further review.

2. Under the Libyan Sanctions Regulations, an attorney in the United States cannot accept compensation from petitioner without first obtaining a license from OFAC. Petitioner contends (Pet. 14-20) that the license requirement violates his Fifth and Sixth Amendment right to assistance of counsel. The district court and the court of appeals held that petitioner lacked standing to bring that claim because OFAC had previously authorized petitioner's attorneys to accept compensation for legal services, and petitioner could not show that he would be deprived of legal services in the future based on the Libyan Sanctions Regulations. Pet. App. 10a-11a, 34a-35a; see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (under Article III, a plaintiff must demonstrate actual or imminent injury in order to invoke the jurisdiction of a federal court). That holding represents a fact-specific application of established legal principles and raises no issue warranting this Court's review.

In any event, petitioner's underlying Fifth and Sixth Amendment claims lack merit. If the restrictions on petitioner's financial transactions are otherwise valid, the absence of a blanket exception for payments to lawyers creates no constitutional infirmity. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989). Moreover, petitioner cites no authority recognizing a constitutional right to pay counsel in the United States for advice in future business transactions. Cf. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 333-334 (1985) (Due Process Clause

and Sixth Amendment do not require counsel in proceedings that do not approximate trials; citing several cases holding that counsel is not required in various forms of administrative proceedings).[5]

3. A court in reviewing administrative action owes substantial deference to the agency's construction of pertinent statutory and regulatory provisions. See,

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[5] Contrary to petitioner's contention (Pet. 17-19), neither *Bernstein* v. *United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999), nor *American Airways Charters, Inc.* v. *Regan*, 746 F.2d 865, 866 (D.C. Cir. 1984) (Ginsburg, J.), supports his constitutional claim. The Ninth Circuit in *Bernstein* found that the source code of a mathematician's encryption software is speech protected by the First Amendment and that the government's licensing requirements for export of encryption technology imposed an invalid prior restraint on his speech. 176 F.3d at 1138-1145. The decision has nothing to do with access to counsel. *American Airways*, far from supporting petitioner's legal theory, indicates that petitioner's United States counsel can validly be required to seek a license from OFAC before receiving compensation for legal services. Petitioner relies (Pet. 19) on the D.C. Circuit's holding that under the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, OFAC cannot condition the formation of an attorney-client relationship on the acquisition of a government license. *American Airways*, 746 F.2d at 871-876. Whatever the merits of that holding, however, it has no application here, since the *American Airways* court carefully distinguished between the formation of an attorney-client relationship and the payment of fees to counsel. The D.C. Circuit observed that "OFAC has undisputed power to deny [a designated Cuban national] permission to engage in specified commercial transactions. We caution here that nothing in our disposition is properly read as authorizing payment to counsel without the approval of OFAC." *Id.* at 875. In the instant case, the district court correctly distinguished *American Airways*, explaining that "the issue is not the 'bare formation of an attorney-client relationship' but the compensated representation of an SDN by a United States attorney." Pet. App. 78a; see also *id.* at 33a-34a & n.9.

e.g., *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984); *Consarc Corp.* v. *United States Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995). Petitioner contends (Pet. 21-26) that OFAC's interpretation of the relevant provisions raises serious constitutional concerns, and that judicial deference is therefore unwarranted. The court of appeals, however, correctly rejected petitioner's constitutional challenges. See Pet. App. 9a-11a. In any event, the court found that "OFAC's interpretation of its own regulation is not plainly inconsistent with the regulatory language, nor is it unreasonable, *and in fact it represents the only practical interpretation.*" *Id.* at 8a (emphasis added). The court's ultimate disposition of the case therefore did not depend on deference—let alone inordinate deference—to the responsible agency's construction of the Libyan Sanctions Regulations.

4. Finally, petitioner contends (Pet. 26-29) that under OFAC's approach to the implementation of IEEPA, the Act effects an unconstitutional delegation of legislative power. Petitioner cites no decision, and we are aware of none, holding any provision of the Libyan Sanctions Regulations to be invalid on that ground. OFAC's authority to publish the SDN list and to apply the Libyan Sanctions Regulations is ultimately derived from the power vested in the President by IEEPA to "regulate, * * * prevent or prohibit, any * * * use, transfer, withdrawal, * * * or dealing in, or * * * transactions involving, any property in which any foreign country or a national thereof has any interest." 50 U.S.C. 1702(a)(1)(B); see Exec. Order Nos. 12,543, 12,544, 3 C.F.R. 181, 183 (1987) (authorizing the Secretary of the Treasury to employ all powers of the President to carry out his Executive Orders

regarding Libya). As petitioner recognizes (Pet. 29), Congress's power to confer broad discretionary authority upon Executive Branch officials is particularly clear with respect to matters touching upon national security and foreign relations. Cf. *Loving* v. *United States*, 517 U.S. 748, 768 (1996). Petitioner's claim therefore lacks merit and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1999

Supreme Court, U.S.
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Director of the Office of Foreign Assets Control,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT

Construing the Executive's use of Specially Designated National ("SDN") lists to assume control over selected foreign citizens' private property and contract rights is a matter of first impression. Petitioner was among the first 21 individuals listed in 1991. Since then, Respondent has used this power expansively in the international community. Respondent's Brief in Opposition ("Opp'n Br.") asks the Supreme Court to deny certiorari and to thereby allow the Fifth Circuit's decision to stand. It would be cited as the sole judicial benchmark, permitting the Executive arbitrary and discretionary power to use SDN lists against selected foreign individuals as a tool to enforce foreign policy. The authors of the Constitution sought to prevent these same legislative and executive tools, then being used in Britain, by prohibiting *ex post facto* laws and bills of attainder. The Constitution also provided due process, legal representation and judicial review to protect individuals' freedom and private property from law enforcement without standards. One issue encompasses all four of the legal issues identified in the briefs:

> Do the President's foreign policy powers trump the judicial and constitutional protections otherwise applicable to foreign citizens?

Respondent claims authority and power to designate Petitioner and to freeze his personal assets, destroy his stock options, terminate his contracts, and criminalize his non-Libyan transactions (past and future) related to any U.S. person or asset, without judicial review of whether his conduct is wrongful. The Fifth Circuit accepted Respondent's exercise of arbitrary and discretionary power over Petitioner's personal assets as being justified by the President's foreign policy of "isolating Libya by severing its economic ties to the rest of the world." [Opp'n Br. at 4, fn. 1.] In this instance, policy deviates from law. First, the rest of the world did not consent to prohibit economic ties. Moreover, neither the

President's Executive Orders nor Respondent's Libyan Sanctions Regulations order the blocking of personal assets of foreign citizens who contract with or are employed by European companies that Respondent identifies as being affiliated with the Government of Libya.

But for the selective naming of Petitioner to the "SDN" list, there is no law authorizing the taking of his personal property or criminalizing his private affairs. The law blocks assets of the Government of Libya. Case law, discussed *infra*, establishes that blocking orders are not permitted against any private property except the assets of the sanctioned country. Respondent avoids such judicial decisions by administrative fiat with the list, applying the sanctions to Petitioner's personal property by simply defining him to be the "Government of Libya." Respondent opposes certiorari with excerpts from the Fifth Circuit decision that would define the scope of authority bestowed upon Respondent according to these principles:

> An Executive agency has the power to authorize itself to selectively designate to lists any foreign citizen even *suspected* of engaging in conduct, although not prohibited by U.S. or other laws, that is not in accordance with the President's foreign *policy* of impeding business with the sanctioned country. [Opp'n Br. at 5.] The foreign citizen once listed is deprived of all of his personal property held in the U.S. and all contract rights with U.S. persons, without notice or due process or appeal. [Opp'n Br. at 4, n. 1.] Any transaction by a listed individual with a U.S. person, which is otherwise legal except for the list, is declared by complex regulations to be a criminal and civil violation for both the designated person and the U.S. person with whom he deals, even if the transaction occurred before he was listed, [Opp'n Br. at 7-8], such as "selling him a McDonald's hamburger."

> [Pl.'s Mem. & Resp. Defs.' Mot. Dismiss, Ex. 4 at 2.]
>
> The agency need not publish any criteria or standards for qualification to the list, for removal from the list, or for licensing exceptions from the punishment. The punishment resulting from designation can only be escaped pursuant to a completely arbitrary scheme allowing applications for licenses from the agency that made the designation.
>
> The agency's regulations can prohibit the listed foreign citizen from obtaining legal representation by a U.S. attorney for conducting business transactions whether or not related to Libya. The only means for authorizing the legal services requires the attorney first to disclose to the agency information obtained through privileged communications in a discretionary process seeking a license, the granting of which has no standards, no time limits for response, and no certainty and rests at the whim of a faceless bureaucrat who has no congressional or judicial oversight.

CASE OF FIRST IMPRESSION

The SDN list merely consists of names published in the Federal Register. Respondent applies this listing of Petitioner's name through a definition of "Government of Libya" in the Libyan Sanctions Regulations. The effect is as if the President issued the Executive Orders against Petitioner and his personal property. Contrary to Respondent's implication, Petitioner is not challenging prior courts' rulings that uphold the blocking of assets of a sanctioned foreign country or "its nationals." *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Milena Ship Management Co. v. Newcomb*, 995 F.2d 620 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994). Respondent does not reveal how those

cases are distinguished from the case of Petitioner. All cases cited by Respondent that uphold blocking pursuant to IEEPA, or its predecessor TWEA, address the blocking of assets in which the sanctioned government (or its nationals if proscribed by the particular sanction regime) owned an interest. In *Milena Ship*, for instance, the Office of Foreign Assets Control was permitted to presume ownership by the Yugoslavian government to justify blocking, but the ship owner would have been permitted upon judicial review to obtain a release of the vessel if the court had not held: "JOP is not a private company . . . we conclude that the Yugoslavian government retains an interest in JOP." *Milena Ship*, 995 F.2d at 625.

The Libyan Sanctions Regulations and Yugoslavian Sanctions Regulations are written with the same language and do not impose blocking orders against the assets of the nationals of the sanctioned country. The IEEPA authorizes the President to order emergency sanctions against "any property in which any foreign country or a national thereof has any interest." 50 U.S.C. § 1702(a)(1)(B) [cited at Opp'n Br. at 10.] Libyan Sanctions Regulations do not prohibit transactions with, or impose blocking on assets of any national — even Libyan nationals — as authorized by the IEEPA, except "to the extent" they act on behalf of the Government of Libya. Respondent cites language of *Regan v. Wald*, 468 U.S. 422, 243 (1984), and *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 875 (D.C. Cir. 1984), to assert judicial approval of its interpretation that it has "undisputed power to deny [a designated Cuban national] permission to engage in commercial transactions." [Opp'n Br. at 9, n. 5.] Those cases were rendered under the Cuban Sanctions Regulations that do order blocking of assets of all nationals of Cuba. 31 C.F.R. §§ 515.201, .302 (1974). Petitioner is not a national of Libya. No case has considered the blocking of personal assets of a person not a national of the sanctioned country except *Real v. Simon*, 510 F.2d 557, *rehearing denied*, 514 F.2d 738 (5th Cir. 1975). In *Real*, the

non-Cuban nationals were entitled to unblock inherited assets, because the deceased Cuban national no longer had a present interest in the assets. *Real*, 510 F.2d at 564.

> [T]he issue is whether there is a sufficient interest on the part of the Cuban government or a Cuban national which would justify or authorize the application [of the regulations] . . . . We hold that such a determination by the United States is arbitrary and without basis in either the language or the purpose of the [TWEA] . . . . The Government recognizes that a Cuban interest must pertain to the assets in order to justify blocking, and so by administrative fiat has decreed that deceased persons have an interest in their assets, thus justifying the blocking . . . .

Id.

APPLICATION OF SDN LIST CREATES A BILL OF ATTAINDER

Respondent avoids the judicial review required by *Milena Ship* and *Real*, which would unblock assets proven to be privately owned, by defining Petitioner to be the "Government of Libya." By administrative fiat, Petitioner's personal assets become "Government of Libya" assets. This application, which is an inescapable conviction upon designation, creates the banned bill of attainder when the SDN is an individual (if the courts follow Respondent's interpretations of the IEEPA "or its nationals" language and its regulatory "to the extent" language). Judicial review to avoid the bill of attainder ban requires an impartial process to measure Petitioner's conduct against a standard of prohibited conduct and "must, of course, be something more than the mechanical determination of whether the accused is indeed a member . . . that a law-making process has already condemned without trial safeguards. . . ." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-4 at 642 (2d ed. 1988).

Respondent and the Fifth Circuit provided no case authority, but the same factual justification, for concluding that the blocking and destruction of Petitioner's personal assets fails the bill of attainder elements of both "legislative act" and "punishment." To be exempt from the bill of attainder ban, Respondent asserted that, rather than a legislative act, the designation "of Petitioner as an SDN is simply a way for the agency . . . to provide notice of his status . . ." and "that mere listing does not inflict . . . punishment." [Opp'n Br. 7-8.] Prior decisions of this Court would conclude that actions to deprive individuals of their personal property "for conduct lawful when engaged in" constitute punishment. TRIBE, *supra* at 642 n.9, 643.

Respondent now admits that whether publication of Petitioner's name to the list was mere notice or whether it implemented a legislative act causing deprivation of his personal assets is a "fact-specific determination." [Opp'n Br. at 8.] The Fifth Circuit refused even to review the District Court's refusal to consider the fact issues that should have prevented summary judgment. [Opp'n Br. at 4.] Respondent is well aware that its method of applying the SDN list has a profound economic and liberty effect against the individual whose name is listed. Thousands of individuals not designated to the list are known to Respondent to be employed by, and serve as directors of, European companies in which the Government of Libya has an interest. Neither the personal assets of those individuals, nor the personal assets of the Libyan nationals who work for the Government of Libya, are blocked under the Executive Orders and Libyan Sanction Regulations. The designation of Petitioner to the SDN list, as applied, was not mere notice. The Supreme Court has stated that Executive acts of rule making are "legislative acts." *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 144 (1950) (Black, J. concurring).

DEFERENCE TO RESPONDENT'S INTERPRETATION

Respondent seeks to have it both ways with its varying interpretations of the purpose of the SDN list. Respondent argued that the list merely constitutes "notice" for the purpose of avoiding the bill of attainder prohibition, but also objected to Petitioner's position that the SDN list simply constitutes "notice" to U.S. persons of potential Libyan agents. The Libyan Sanctions Regulations prohibit conduct by U.S. persons, not foreign citizens. A significant omission exists in Respondent's Brief in Opposition where it implies that *all* trade and financial transactions with Libyan companies are prohibited. [Opp'n Br. at 4]. Instead, only *U.S. Persons* are prohibited from engaging in such transactions. The list would actually serve as notice to U.S. persons if the named individuals, like Petitioner, had the right to judicial review by an independent trier of fact to determine whether his personal retirement funds are not "property of controlled entities of Libya." [Opp'n Br. at 4, n. 1.]

The Fifth Circuit concluded that Respondent's disregard of the limiting words "to the extent" was appropriate and "represents the only practical interpretation," [Opp'n Br. at 5 and 10], stating also that "OFAC's interpretation . . . allow[s] it to block all property of controlled entities of Libya without determining whether the particular transaction at issue will ultimately benefit or serve the interest of the Government of Libya." [Opp'n Br. at 4, n.1.] A presumption for blocking is appropriate, as described in the facts of *Milena Ship, supra*, but Respondent changed the regulatory scheme after *Milena Ship* by defining Petitioner to be the government to avoid the judicial review. One need only to read the Fifth Circuit opinion to see that Respondent's interpretations were given deference to avoid giving meaning to the regulatory and statutory words of limitation. The Fifth Circuit concurred based upon Respondent's stated policy for its interpretation rather than the plain language review required when serious

constitutional issues are at stake. *Williams v. Babbitt*, 115 F.3d 657, 661 (9th Cir. 1997).

ACCESS-TO-COUNSEL

Respondent's first sentence in replying to the access-to-counsel issue, [Opp'n Br. at 8], is misleading and tells only half the story. The Libyan Sanctions Regulations authorize legal representation to the "Government of Libya" by a standing license for only limited purposes, such as explaining U.S. laws and defending actions filed in the U.S. against a SDN, *provided that* such services do not "facilitate transactions." 31 C.F.R. § 550.517(b). Payment is prohibited for *all* legal services unless the attorney obtains a special license to approve the attorney, at the discretion of Respondent. 31 C.F.R. § 550.517(a). Respondent denied Petitioner's license requests for (i) access to U.S. legal counsel for Petitioner related to business transactions for his personal affairs, (ii) for his employer's business unrelated to Libya, and (iii) for his work as President of a company owned exclusively by a U.S. corporation that is not a SDN.

Respondent cites only two new cases in its brief. Respondent provides a comparative cite to *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), for its position that the Executive may legislate a prohibition against payments to lawyers. [Opp'n Br. at 8.] In *Caplin*, attorneys challenged the constitutionality of the forfeiture statute, because it resulted in forfeiture of all money (drug proceeds) that the drug law offender possessed to pay his attorneys. *Caplin* does not support Respondent's position that it has the right by regulation to restrict access to U.S. legal counsel for designated individuals by an arbitrary licensing process. To the contrary, *Caplin* acknowledged one's right of access-to-counsel by paying one's lawyer is "a constitutionally protected right." *Caplin*, 491 U.S. at 628.

Respondent's second new citation, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333-34 (1985), is also distinguishable. In *Walters*, veterans organizations

were challenging a law passed by Congress that limited payment of attorneys to $10 in challenging the denial of veterans benefits. *Walters* determined that the due process rights of veterans are not denied in such an instance where (i) the government is paternally protecting the individual, (ii) judicial procedures exist with sufficient safeguards established to reduce the risk of an erroneous deprivation of private interests, (iii) competent representatives are provided, and (iv) the independent trier of fact is duty bound to shift the burden of proof against the government in favor of the individual. *Walters*, 473 U.S. 333 at 321, 332-33. In applying the flexible due process analysis, *Walters* upheld this statute limiting access to legal counsel with the same analysis that *Fleming v. Nester*, 363 U.S. 603 (1960), refused to afford an alien relief on a bill of attainder analysis. In *Fleming v. Nester*, the Court determined that legislation restricting social security benefits was not "punishment" to constitute a bill of attainder, although the alien was afforded review, because social security is a governmental privilege and not a private property ownership right. *Walters* held that veterans benefits, although a type of property interest, constituted a governmentally offered privilege rather than a personal property interest. *Compare Walters*, 473 U.S. at 333 *with Goldberg v. Kelly*, 397 U.S. 254 (1970), (finding that a welfare recipient subjected to possible termination of subsistence benefits is entitled to be represented by an attorney and that a statute limiting counsel was unconstitutional).

Walters also addressed the First Amendment right to counsel that is asserted by Petitioner. Although *Walters* denied that the veterans were being denied their First Amendment right to representation, the ruling was on the basis that the veterans are afforded a fair and "meaningful" hearing process. *Walters*, 473 U.S. at 335. Respondent only offered Petitioner the opportunity to submit more license requests to Respondent, which arbitrarily acts after months of delay. "What is at stake is the right of an individual to

consult an attorney of choice in connection with the Government. In my opinion, that right is firmly protected by the Due Process Clause of the Fifth Amendment and by the First Amendment." *Walters*, 473 U.S. at 368 (Stevens, J., dissenting).

Noteworthy is the fact that Respondent, both before the Fifth Circuit and before this Court, refused to address or distinguish *Amusement Devices Ass'n v. Ohio*, 443 F. Supp. 1040 (S.D. Ohio 1977), the most directly applicable access-to-counsel case. Respondent also failed to address the right to an attorney and the appurtenant privilege afforded foreign persons in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Finally, Respondent mischaracterizes Petitioner's analysis of *Bernstein v. United States Department of Justice*, 176 F.3d 1132 (9th Cir. 1999). [Opp'n Br. at 9, n. 5.] Petitioner cited *Bernstein* as the most directly applicable factual case in the protection of First Amendment rights where a federal court analyzed an arbitrary licensing scheme as used by Respondent to deny Petitioner judicial review. Accountability of Respondent is nonexistent in Respondent's regulatory scheme for Petitioner. Respondent cites *Walters*, a case that was only addressing a process for reduction of benefits with no possibility for imposing criminal penalties or taking personal property, which holds that legislation may restrict access-to-counsel where the proceeding provides other adequate procedural safeguards to protect the interest of the individual. *Bernstein* analyzed extensively that an arbitrary licensing scheme that affords a government agency unbridled discretion to limit First Amendment rights was unconstitutional unless the scheme affords judicial review to determine whether the individual's conduct was wrongful. There is no wrongful conduct of Petitioner, and thus any judicial review would not find a basis to merit the deprivation of personal property.

Respectfully submitted,

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